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CASES DECIDED

536s

ON THE

BRITISH NORTH AMERICA ACT, 1867,

IN

THE PRIVY COUNCIL, THE SUPREME COURT OF CANADA, AND THE PROVINCIAL COURTS.

COLLECTED AND EDITED BY
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VOL. III.

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PREFACE.

THE present volume contains the reported cases in the Privy Council, the Supreme Court of Canada, and in the Courts of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in continuation of those previously published.

The method of arrangement adopted in the former volumes has been retained.

The head notes, with one or two exceptions have been revised or re-written.

Where any part of a judgment is omitted the omission is marked by asterisks or otherwise, the matters omitted being such only as do not relate to the constitutional points. Square brackets, thus [ ], shew that the words placed within them are introduced by the editor.

The numbers inserted in the margin refer to the pages of the original reports.

All quotations and references have, as far as possible, been verified and corrected.

As the old Constitutions of the Provinces now forming the Dominion of Canada and the Constitution of the United States are occasionally referred to in the discussions arising on the B. N. A. Act, they have been printed at the end of this volume.

August, 1887.

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CASES DECIDED

ON THE

BRITISH NORTH AMERICA ACT, 1867.

PRIVY COUNCIL.

THE ATTORNEY-GENERAL OF ONTARIO ..... *Informant;*

AND

ANDREW F. MERCER ..... *Defendant.*

J. C.*
1883
July, 5, 6, 18.

On Appeal from the Supreme Court of Canada.

[*Reported 8 App. Cas. 767.*]

B. N. A. Act, ss. 102, 109—Escheats—Provincial revenues—Royalties.

Lands in the Province of Ontario escheated to the Crown for defect of heirs belong to the Province and not to the Dominion.

At the date of passing the B. N. A. Act the revenue arising from all escheats to the Crown within the then Province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act vested in the Dominion the general public revenues, as then existing of the Provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the Provinces—the words "lands, mines, minerals and royalties" therein including, according to their true construction, royalties in respect of lands such as escheats.

Appeal from an order of the Supreme Court of Canada (Nov. 14th, 1881), (1), reversing an order of the Court of

Present:—THE LORD CHANCELLOR (EARL OF SELBORNE), SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 5 Can. S. C. R., 538; *post*, p. 16.

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STATEMENT.

[768] Appeal for Ontario (March 27th, 1880,) (1), which unanimously affirmed an order of one of the judges of the Court of Chancery (January 7th, 1879), (2).

On the 28th of September, 1878, the appellant filed an information on behalf of the Crown to recover from the respondent and others possession of a certain piece of land in the city of Toronto, in the Province of Ontario, being part of the real estate of Andrew F. Mercer, who died intestate on the 13th of June, 1871, and without leaving any heirs or next of kin. The respondent demurred thereto for want of equity. The first Court held in favour of the appellant that the land had escheated to the Crown for the benefit of the Province, and this judgment was affirmed by the Court of Appeal.

The Dominion Government appealed in the name of the respondent, and it was agreed between the two Governments that the appeal should be limited to the question whether the Government of Canada or that of Ontario was entitled to lands situate in the Province of Ontario and escheated to the Crown for want of heirs.

The Supreme Court, by a majority (Fournier, Henry, Taschereau and Gwynne, JJ., Ritchie, C.J., and Strong, J., dissenting), reversed the judgments of the Courts below, and dismissed the information. The reasons stated shortly were that escheat is not a reversionary right but a fiscal prerogative; that the feudal system has never existed in Canada; that the privileges of the Provinces were surrendered as a preliminary to the Confederation effected by the B. N. A. Act; that by that Act all duties and revenues were transferred to the Dominion and to be appropriated to the public service of Canada; and that the Act does not confer on the Government or Legislature of Ontario any right to receive or dispose of the revenue arising from escheated estates situate in the Province.

(1) 6 App. Rep., 576, *post*. (2) 26 Grant, 26, *post*.

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Davey, Q.C., and *Mowat*, Q.C. (Attorney-General of Ontario), with them, *Cartwright*, of the Canadian bar, and *Raleigh*, for the appellant:—

Lands in the Province of Ontario are held in free and common socage. Reference was made to 31 Geo. III. c. 31, ss. 43, 44. Escheat is a reversionary right incident to such tenure. Such lands belonged to Her Majesty for the [769] benefit of the Province before they were granted, and must be taken to revert to the Crown for the benefit of the Province on escheat for want of heirs. The Lieutenant-Governor of the Province, see B. N. A. Act, sects. 72, 75, acts in the Queen's name, and therefore represents the Queen, notwithstanding that he is appointed by the Governor-General of the Dominion. See also *Théberge* v. *Landry* (1). For an outline of the legislation shewing how public lands have been dealt with in Canada generally, and how the title thereto has been gradually transferred to the Province: see 1 Anne, c. 1, especially s. 8; 39 and 40 Geo. III. c. 88; 47 Geo. III. c. 24; 1 William IV. c. 25; 1 & 2 Vict. c. 2. See also the Colonial legislation, viz.: 7 William IV. (Upper Canada), c. 118, and after the Imperial Statute, 3 & 4 Vict. c. 35, for the union of the two Canadas, especially sects. 50, 51, 54. Reference was made to 4 & 5 Vict. c. 100 (Canada), and 12 Vict. c. 31, amending it; 9 Vict. c. 114 (Canada), in substance a re-enactment by the Provincial Legislature of the provisions of the Act of Union (3 & 4 Vict. c. 35), confirmed by 10 & 11 Vict. c. 71, and to 15 & 16 Vict. c. 39 (Imperial).

The primary question is whether escheats fall within sect. 102 or sect. 109 of the B. N. A. Act. Escheated lands are within sect. 109. The right by escheat is a species of reversion. See *Burgess* v. *Wheate* (2), and Chitty on the Prerogatives of the Crown, pp. 230, 233. (Sir MONTAGUE E. SMITH.—Blackstone puts it under the

(1) 2 App. Cas. 102; *ante*, vol. 2, p. 1. (2) 1 Eden. 227; 1 W. Bl. 123.

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head of purchase. Sir RICHARD COUCH referred to sect. 637 of the Civil Code of Lower Canada.) Such right, or inchoate right, or possibility of a right is an interest of the Crown in land within sect. 109. The other side say that the right by escheat is a right to revenue within sect. 102, which has not been transferred to the Province. There is no interpretation of "revenues" in the Act. But in sect. 109 the word "royalties" covers escheats. If used in a narrow sense the word would be superfluous, being included in "mines." And as regards the word "lands," all lands ungranted at the time of the Union belonged to the Province, and the right to take by escheat is an interest in land which belongs to the same owner who would have had the power to grant. Escheats would also come under the head of "property and civil rights." [770] See sect. 92, sub-sect. 13. When a subject is assigned to the Province, any revenue derived from thence is also assigned. Reference was made to *Church* v. *Blake* (1); Chitty on Prerogatives, p. 31. The revenues subject to the Dominion under the B. N. A. Act are such as are regularly appropriated to the public service, not those which are subject to executive control, and grantable by Her Majesty ex speciali gratiâ, among which are to be reckoned the revenues arising from escheated estates. See 22 Vict. c. 16, ss. 1, 12 and 15 (Con. Stat. Canada).

The Solicitor-General (Sir F. Herschell), and *Lash*, Q.C., of the Canadian bar (*Jeune* with them), for the respondent:—

The appellant has failed to shew affirmatively that escheats in the Province belonged to it. It is immaterial whether escheat is a matter of reversion or not: it exists jure coronæ. The law does not recognise a reversion on a grant in fee-simple, but a right or prerogative of the

(1) 2 Quebec Law Rep. 236, *post*, sub. nom. *Attorney-General of Quebec* v. *Attorney-General of the Dominion.*

Crown under which lands fall to the Crown under certain circumstances. Reference was made to 31 Geo. III. c. 31, s. 43, and 2 Blackstone, p. 89. That right never belonged to the Province, and therefore is unaffected by sect. 109 of the B. N. A. Act. The fruits of escheats were always a part of the royal revenue, and in the various statutes which deal with this question escheated lands are always treated as revenue. Those statutes deal with revenue, and not with reversionary or prerogative rights. See 1 Anne, c. 1, s. 5; 39 and 40 Geo. III. c. 88; 59 Geo. III. c. 94; 10 Geo. IV. c. 50, s. 126; 1 Wm. IV. c. 25, s. 12; 3 & 4 Vict. c. 35, s. 54; 9 Vict. c. 114 (Canada), confirmed by 10 & 11 Vict. c. 71; 4 & 5 Vict. c. 100 (Canada), and 12 Vict. c. 31 (Canada). These last two Acts dealt with public lands, including those which had escheated. "Casual revenues" must include revenues from escheats. See 15 and 16 Vict. c. 39, which ratifies the provisions of the two Colonial Acts; for the latter assumed to legislate in regard to lands which might escheat, the only power to do so resulting from the power to deal with casual revenues as given by the Act of Union 3 & 4 Vict. c. 35, s. 54; while Parliament gives a legislative construction to the Act which gives such power. Legislation, therefore, dealt with the fruits of escheat [771] as revenue, and not as an interest in lands; and the Dominion Parliament had the power of appropriation over such revenue. The result of the B. N. A. Act was to create certain provinces with certain constitutional rights, new legislatures and new executives. Previously the Lieutenant-Governor of each Province directly represented the Queen. Under the Act the Queen is part of the Dominion Parliament (sect. 17), not of the Ontario Legislature (sect. 69). The Lieutenant-Governor does not now represent the Queen except where the Act so directs. Reference was made to sects. 92, 109, 117. *Russell* v.

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The Queen (1). The word "lands" does not include escheats after the Act, it includes lands ungranted and lands escheated before the Act. The word "royalties" in sect. 109 is not wide enough to include escheats; and is not a word which would be used for that purpose. Sect. 117 only refers to property actually in use for public purposes. Inasmuch as the fruits of escheats are not expressly given to the several Provinces, they belong to the Dominion.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Earl of Selborne):—

The question to be determined in this case is, whether lands in the Province of Ontario, escheated to the Crown for defect of heirs, "belong" (in the sense in which the verb is used in the B. N. A. Act, 1867), to the Province of Ontario or to the Dominion of Canada.

By the Imperial Statute 31 Geo. III. c. 31, s. 43, it was provided that all lands which should be thereafter granted, within the Province of Upper Canada (now Ontario), should be granted in free and common socage, in like manner as lands were then holden in free and common socage in England. The argument before their Lordships, on both sides, proceeded upon the assumption that the lands now in question were so holden.

All land in England, in the hands of any subject was holden of some lord by some kind of service, and was [772] deemed in law to have been originally derived from the Crown, "and therefore the King was Sovereign Lord, or lord paramount, either mediate or immediate, of all and every parcel of land within the realm" (Co. Litt. 65a). The King had "dominium directum," the subject

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

"dominium utile" (*Ibid.* 1a). The word "tenure" signified this relation of tenant to lord. Free or common socage was one of the ancient modes of tenure ("A man may hold of his lord by fealty only, and such tenure is tenure in socage," Litt. sect. 118), which, by the Statute 12 Car. II. c. 24, was substituted throughout England for the former tenures by knight-service and by socage in capite of the King, and relieved from various feudal burdens. Some, however, of the former incidents were expressly preserved by that statute, and others (escheat being one of them), though not expressly mentioned, were not taken away.

"Escheat is a word of art, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated." (Co., Litt. 13a). Elsewhere (*Ibid.* 92b), it is called "a casual profit," as happening to the lord "by chance and unlooked for." The writ of escheat, when the tenant died without heirs, was in this form:—"The King to the Sheriff, &c. Command A., &c., that he render to B. ten acres of land, with the appurtenances, in N., which C. held of him, and which ought to revert to him the said B. as his escheat, for that the said C. died without heirs" (F. N. B., 144 F.) If there was a mesne lord, the escheat was to him; if not, to the King.

From the use of the word "revert," in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat as a species of "reversion." There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee-simple. What is meant is that, when there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. Other writers speak of the lord as taking it by way of succession or inheritance, as if from the

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tenant, which is certainly not accurate. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

[773] The profits and the proceeds of sales, of lands escheated to the Crown, were in England part of the casual hereditary revenues of the Crown, and (subject to those powers of disposition which were reserved to the Sovereign by the Restraining and Civil List Acts) they were among the hereditary revenues placed at the disposal of Parliament by the Civil List Acts passed at the beginning of the present and the last preceding reign. Those Acts extended, expressly, to all such casual revenues, arising in any of the colonies or foreign possessions of the Crown. But the right of the several Colonial Legislatures to appropriate and deal with them, within their respective territorial limits, was recognised by the Imperial Statute 15 & 16 Vict. c. 39, and by an earlier Imperial Statute (10 & 11 Vict. c. 71), confirming the Canada Civil List Act, passed in 1846 after the union of Upper and Lower Canada, by which Act the provision made by the Colonial Legislature for the charges of the Royal Government in Canada was accepted and taken, instead of "all territorial and other revenues," then at the disposal of the Crown, arising in that Province; over which (as to three fifths permanently, and as to two-fifths during the life of the Queen, and for five years afterwards), the Legislature of the Province was to have full power of appropriation. It may be remarked, that the Civil List Acts of the Province of Canada contained no reservation of escheats, similar to sect. 12 of each of the Imperial Civil List Acts above referred to. It must have been purposely omitted, in order that escheats might be dealt with by the Government or Legislature of Canada, and not by the Crown, in whose disposition they must have remained if they had not been in that of the United Province of Canada.

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When, therefore, the "British North America Act" of 1867 passed, the revenue arising from all escheats to the Crown, within the then Province of Canada, was subject to the disposal and appropriation of the Canadian Legislature.

That Act united into one "Dominion," under the name of "Canada," the former Provinces of Canada (which is subdivided into the two new Provinces of Ontario and Quebec, corresponding with what had been before 1840 Upper and Lower Canada), Nova Scotia and New Bruns-
[774] wick. It established a Dominion Government and Legislature and Provincial Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient. In particular, it imposed upon the Dominion the charge of the general public debts of the several pre-existing Provinces, and vested in the Dominion (subject to exceptions, on which the present question mainly turns), the general public revenues, as then existing, of those Provinces. This was done by sect. 102 of the Act, which is in these words:—"All duties and revenues, over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada, in the manner, and subject to the charges, in this Act provided."

If there had been nothing in the Act leading to a contrary conclusion, their Lordships might have found it difficult to hold that the word "revenues," in this section did not include territorial as well as other revenues; or that a title in the Dominion to the revenues arising from

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public lands did not carry with it a right of disposal and appropriation over the lands themselves. Unless, therefore, the casual revenue, arising from lands escheated to the Crown after the Union, is excepted and reserved to the Provincial Legislatures, within the meaning of this section, it would seem to follow that it belongs to the Consolidated Revenue Fund of the Dominion. If it is so excepted and reserved, it falls within sect. 126 of the Act, which provides that "such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall, in each Province, form one Consolidated Revenue Fund, to be appropriated for the public service of the Province."

[775] Their Lordships, for the reasons above stated, assume the burden of proving that escheats, subsequent to the Union, are within the sources of revenue excepted and reserved to the Provinces, to rest upon the Provinces. But, if all ordinary territorial revenues arising within the Provinces are so excepted and reserved, it is not à priori probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been, unless by accident and oversight, transferred to the Dominion. The words of the statute must receive their proper construction, whatever that may be; but, if this is doubtful, the more consistent and probable construction ought, in their Lordships' opinion, to be preferred. And it is a circumstance not without weight in the same direction, that, while "duties and revenues" only are appropriated to the Dominion, the public property itself, by which territorial revenues are produced (as distinct from

the revenues arising from it), is found to be appropriated to the Provinces.

The words of exception in sect. 102 refer to revenues of two kinds: (1) such portions of the pre-existing, "duties and revenues" as were by the Act "reserved to the respective Legislatures of the Provinces;" and (2) such duties and revenues as might be "raised by them, in accordance with the special powers conferred on them by this Act." It is with the former only of these two kinds of revenues that their Lordships are now concerned; the latter being the produce of that power of "direct taxation within the Province, in order to the raising of a revenue for Provincial purposes," which is conferred upon Provincial Legislatures by sect. 92 of the Act.

There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the Provinces, viz., the 109th section:—"All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." The Provincial Legislatures are not, in terms, here men-
[776] tioned; but the words, "shall belong to the several Provinces," are obviously equivalent to those used in sect. 126, "are by this Act reserved to the respective Governments or Legislatures of the Provinces." That they do not apply to all lands held as private property at the time of the Union seems clear from the corresponding language of sect. 125. "No lands or property *belonging to* Canada, or any Province, shall be liable to taxation:" where public property only must be intended. They

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evidently mean lands, etc., which were, at the time of the Union, in some sense and to some extent publici juris; and, in this respect, they receive illustration from another section, the 117th (which their Lordships do not regard as otherwise very material), "The several Provinces shall retain all their respective public property, not otherwise disposed of in this Act, subject to the right of Canada to assume any *lands or public property* required for fortifications, or for the defence of the country."

Their Lordships are not satisfied that sect. 102, when it speaks of certain portions of the then existing duties and revenues as "reserved to the respective Legislatures of the Provinces," ought to be understood as referring to the powers of provincial legislation conferred by sect. 92. Even, however, if this were so held, the fact that exclusive powers of legislation were given to the Provinces as to "the management and sale of the public lands *belonging* to the Province," would still leave it necessary to resort to sect. 109 in order to determine what those public lands were. The extent of the Provincial power of legislation over "property and civil rights in the Province" cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under sects. 91 and 102, and therefore cannot throw much light upon the extent of the exceptions and reservations now in question.

It was not disputed in the argument for the Dominion at the Bar, that all territorial revenues arising within each Province from "lands," (in which term must be comprehended all estates in land), which at the time of the Union belonged to the Crown, were reserved to the respective Provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between Crown lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted, that a line was drawn at the date of the Union, and that

[777] the words were not sufficient to reserve any lands afterwards escheated, which at the time of the Union were in private hands, and did not then belong to the Crown.

If the word "lands" had stood alone, it might have been difficult to resist the force of this argument. It would have been difficult to say that the right of the lord paramount to future escheats was "land belonging to him," at a time when the fee-simple was still in the freeholder. If capable of being described as an interest in land, it was certainly not a present proprietary right to the land itself. The word "lands," however, does not here stand alone. The real question is as to the effect of the words "lands, mines, minerals and royalties," taken together. In the Court of Appeal, of the Province of Quebec it has been held that these words are sufficient to pass subsequent escheats; and, for this purpose, stress was laid by some, at least, of the learned Judges of that Court (the others not dissenting), on the particular word "royalties" in this context. If "lands and royalties" only had been mentioned (without "mines" and "minerals"), it would have been clear that the right of escheats (whenever they might fall), incident at the time of the Union to the tenure of all socage lands held from the Crown was a "royalty" then belonging to the Crown within the Province, so as to be reserved to the Province by this section, and excepted from sect. 102. After full consideration, their Lordships agree with the Quebec Court in thinking that the mention of "mines" and "minerals," in this context is not enough to deprive the word "royalties" of what would, otherwise, have been its proper force. It is true (as was observed in some of the opinions of the majority of the Judges in the Supreme Court of Canada) that this word "royalties" in mining grants or leases (whether granted by the Crown or by a

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subject), has often a special sense, signifying that part of the reddendum which is variable, and depends upon the quantity of minerals gotten. It is also true that, in Crown grants of land in British North America, the practice has generally been to reserve to the Crown, not only royal mines, properly so called, but minerals generally; and that mining grants or leases had, before the Union, been made by the Crown both in Nova Scotia and in New Brunswick; and that, in two Acts of the Province [778] of Nova Scotia (one as to coal mines, and the other as to mines and minerals generally), the word "royalties" had been used in its special sense, as applicable to the variable reddenda in mining grants or leases. Another Nova Scotia Act of 1849, surrendering to the Provincial Legislature the territorial and casual revenues of the Crown arising within the Province, was also referred to by Mr. Justice Gwynne. But the terms of that Act were very similar to those now under consideration; and if "royalties," in the context which we have here to consider, do not necessarily and solely mean reddenda in mining grants or leases, neither may they in that statute.

It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals. Even as to mines and minerals, it here necessarily signifies rights belonging to the Crown, jure coronæ. The general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights, for purposes of revenue and government, to the Provinces in which they are situate or arise. It is

a sound maxim of law, that every word ought, primâ facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense, "royalties" is merely the English translation or equivalent of "regalitates," "jura regalia," "jura regia." (See, in voce "royalties," Cowell's "Interpreter;" Wharton's Law Lexicon; Tomlins' and Jacobs' Law Dictionaries.) "Regalia" and "regalitates," according to Ducange, are "jura regia;" and Spelman (Gloss Arch.) says, "Regalia dicuntur jura omnia ad fiscum spectantia." The subject was discussed with much fulness of learning, in *Dyke* v. *Walford* (1), where a Crown grant of jura regalia, belonging to the County Palatine of Lancaster, was held to pass the right to bona vacantia. "That it is a jus" (said Mr. Ellis, in his able argument, ibid., p. 480), [779] "is indisputable; it must also be regale; for the Crown holds it generally through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights." With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case.

Their Lordships are not now called upon to decide whether the word "royalties" in sect. 109 of the British North America Act of 1867, extends to other Royal rights besides those connected with "lands," "mines" and "minerals." The question is, whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in

(1) 5 Moore P. C. 434.

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respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural), also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective Provinces.

The conclusion at which their Lordships have arrived is, that the escheat in question belongs to the Province of Ontario, and they will humbly advise Her Majesty that the judgment appealed from ought to be reversed, and that of the Vice-Chancellor and Court of Appeal of Ontario restored. It is some satisfaction to know, that in this result the Courts of Quebec and Ontario have agreed; and, though it differs from the opinion of four judges, constituting the majority in the Supreme Court of Canada, two of the Judges of that Court, including the Chief Justice, dissented from that opinion.

This being a question of a public nature, the case does not appear to their Lordships to be one for costs.

JUDGMENTS IN SUPREME COURT OF CANADA.

[*Reported 5 Can. S. C. R. 538.*]

RITCHIE, C. J.:—

This is an action brought by the Attorney-General for the Province of Ontario to recover from the defendants the possession of a certain parcel or tract of land in the City of Toronto, and County of York, in the Province of Ontario, being part of the real estate of one Andrew Mercer, late of the said City of Toronto, issuer of marriage licenses, who died intestate, and without leaving any heirs or next of kin, on the thirteenth June, 1871, and whose real estate, it is alleged, escheated to the Crown for the benefit of the Province of

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Ontario. The said Andrew Mercer, at the time of his death, was seised in fee-simple in possession of the parcel of land in question.

The action was commenced in the Court of Chancery for Ontario by the filing of an information on the 28th day of September, A.D. 1878.

The defendant, Andrew F. Mercer, demurred to the said information for want of equity.

On the 7th day of January, 1879, the Vice-Chancellor made an order over-ruling the said demurrer.

[624] From this decision the said defendant, Andrew F. Mercer, appealed to the Court of Appeal, and the appeal was argued on the 23rd day of May, A.D. 1879; and on the 27th day of March, 1880 the said Court of Appeal affirmed the order, over-ruling the demurrer, and dismissed the appeal with costs.

Against this last mentioned judgment and order of the Court of Appeal the defendant, Andrew F. Mercer, now appeals to the Supreme Court of Canada. The parties agree that the appeal shall be limited to the broad question as to whether the Government of Canada or of the Province is entitled to estates escheated to the Crown for want of heirs.

We have therefore nothing whatever to do with any other question than simply to determine to which Government escheated estates belong.

The determination of this question depends upon the construction of the B. N. A. Act.

Before, however, referring to that Act, to enable us the better to understand its provisions and to arrive at a correct conclusion as to the intention of the Parliament of Great Britain in reference to this matter, it may be well to see what the state of the law was in regard to escheated estates, and how such estates were dealt with in the Provinces at the time this Act passed.

With respect, then, to the law of escheat, the doctrine is unquestionably founded on the principles of the feudal system, and is not to be confounded with forfeitures of land to the Crown, from which it essentially differs. Mr. Chitty, in his Prerogatives of the Crown, (p. 230), observing on this difference, says: "For forfeitures were as before observed used and inflicted as punishments by the old Saxon law without the least relation to the feudal system, and they differ in other material respects."

[625] And therefore he says: "Escheats revert . . . to the lord of the fee who is almost universally the king. In the case

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of attainder of high treason, the superior law of forfeiture intervenes, and renders the doctrine of escheat irrelevant, for by such attainder lands of inheritance, though holden of another lord, are forfeited to the Crown."

And Chancellor Kent (1) says of title by forfeiture: "The English writers carefully distinguish between escheat to the chief lord of the fee and forfeiture to the Crown. The one was a consequence of the feudal connection, the other was anterior to it, and inflicted upon a principle of public policy."

It is clear that the law of escheat is an incident of tenure, by which, for failure of heirs, the feud falls back into the lord's hand by a termination of the tenure, and therefore it is said that all lands and tenements held in socage, whether of the king or of a subject, are liable to the law of escheat, and no species of property which does not lie in tenure is subject to escheat, and so Mr. Chitty says (p. 233): "His Majesty's right to escheat stands on the same ground as every other legal right; it arises out of the seisin, and is, in general, governed by the same rules as govern escheats to the subject."

And Chancellor Kent (2) thus speaks of title by escheat: "This title, in the English law, was one of the fruits and consequences of feudal tenure. When the blood of the last person seised became extinct, and the title of the tenant in fee failed from want of heirs or by some other means, the land resulted back, or reverted to the original grantor, or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats under the English law are declared to be strictly feudal and to import the extinction of tenure."

And so it is said: "The lord on the escheat takes the estate by a title paramount to the tenant since he is in of an estate out of which the tenant's interest was originally derived or carved, and it is said to be 'a mixed title, being neither a pure purchase nor a pure descent, but in some measure compounded of both,' and that it differs from a forfeiture in that the latter is for a crime personal to [626] the offender, of which the Crown is entitled to take advantage by virtue of its prerogative, while an escheat results from the tenure only, 'and arises from an obstruction in the course of descent.' It originated in feudalism and respects the intestate's succession."

And Mr Adams says: "Escheat is merely an incident of tenure

(1) Com. vol. 4, p. 426. (2) Com. vol. 4, p. 423.

arising out of the feudal system whereby the escheated estate on the death without heirs of the person last seised escheats to the lord as reverting to the original grantor, there being no longer a tenant to perform the services incidental to the tenure. It is therefore inapplicable to estates which do not lie in tenure."

And this right of escheat is treated of as a reversion.

In Cruise's Digest (1) it is said: "Escheat is a casual profit quod accidit domino ex eventu et ex insperato, which happens to the lord by chance, and unlooked for. An escheat is therefore in fact a species of reversion, and is so called and treated by Bracton . . . and when a general liberty of alienation was allowed without the consent of the lord, this right became a sort of caducary succession, the lord taking as ultimus hæres

And in *Burgess* v. *Wheate* (2) it is said: "An escheat was in its nature feudal, . . . and in default of heirs, the land escheated or reverted strictly speaking, and the legal right of escheat with us arises from the law of enfeofment to the tenant and his heirs, and then it returned to the lord, if the tenant died without heirs."

And again: "It reverts by operation of law on extinguishment of an estate that was a fee-simple incapable of any further limitations. . . . The right comes as a reversion failing heirs."

And in a note to *Middleton* v. *Spicer* (3) by Mr. Eden, he says: "In *Burgess* v. *Wheate* it was a question of tenure, the claim of the Crown having been admitted on all sides to be seignioral and not prerogatival."

If, then, this is a reversionary interest, we all know that reversion is defined by Lord Coke to be the returning of the land to the grantor or his heirs after the grant is determined.

[627] In another place Lord Coke describes a reversion to be "where the residue of the estate always doth continue in him that made the particular estate."

The idea of a reversion is founded on the principle that where a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him, and the possession of it reverts or returns to him upon the determination of the preceding estate.

Hence Lord Coke says: "The law termeth a reversion to be expectant on the particular estate, because the donor or lessor, or their

(1) Vol. 3, p. 397.
(2) 1 Wm Bl. 123, 133, 175.
(3) 1 Brown C. C. 201, 205.

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heirs, after every determination of any particular estate, doth expect, or look for, to enjoy the lands or tenements again."

And Chancellor Kent (1) thus defines a reversion: "A reversion is the return of land to the grantor and his heirs after the grant is over; or, according to the formal definition in the New York Revised Statutes, it is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. It necessarily assumes that the original owner has not parted with his whole estate or interest in the land. . . .

The usual incidents to the reversion, under the English law are fealty and rent."

In *Bunter* v. *Coke* (2) before the passing of the statute making wills speak from the death of the party, it was held that "a devise of lands is not good if the testator had nothing in them at the time of the making his will; for a man cannot give that which he has not, and the statute only empowers men having lands to devise them, so that if the devisor has not the lands, he is out of the statute;" citing Co. Lit., 392. It was admitted "that, if one has a manor and devises it, and after a tenancy escheat, that shall pass by the devise as being part of the manor."

[628] This being the doctrine and law of escheat, the Crown before Confederation surrendered to the respective Provinces the management, control, and disposal of the Crown estate, and the casual and territorial revenues of the Crown derivable therefrom; in other words, the Crown surrendered its rights in the public domain, and practically placed the Provinces in the same position in reference thereto that the Crown itself held.

Our attention has been called by the learned counsel, in his contention for the claims of the Dominion, to the law passed in the Province of New Brunswick, as illustrative of what the Crown intended to part with in reference to all the Provinces. This Act, as I stated in the argument, was prepared in England. It was transmitted by Lord Glenelg, the then Colonial Secretary, in a despatch dated 31st October, 1836, to the Lieut.-Governor, Sir A. Campbell, in which he says: "Sir,—In my despatch of the 10th September, I apprised you that I was engaged in correspondence with Messrs. Crane & Wilmot (then delegates from the H. of Ass. of N. B.) on the provisions of the Act for securing the Civil List which it is proposed

(1) Com. vol. 4, pp. 353, 355.

(2) 1 Salkeld, 237.

to grant to His Majesty in New Brunswick, I now enclose for your information a copy of that bill, which has been prepared in concurrence with the Lords Commissioners of His Majesty's Treasury. It is compiled from the corresponding Acts of Parliament which apply to the grant of the Civil List in this country, with no other changes than such as unavoidably grow out of the different circumstances of the two cases."

This Act was subsequently made perpetual, and is to be found in the Consolidated Statutes of New Brunswick, 1877, title 3, ch. 5, [p. 1015] and by which it is enacted that :

Sect. 1. "The proceeds of all Her Majesty's hereditary, territorial and casual revenues, and of all sales and leases of Crown lands, woods, mines and royalties, now and hereafter to be collected, having been surrendered by the Crown, shall with the exceptions hereinafter provided, be payable and paid to the Provincial Treasurer for the use of the Province."

[629] Sect. 2 provides for the payment to Her Majesty of the clear yearly sum of £14,500 out of the above and other revenues of the Province, with preference to all other charges or payments.

Sect. 3. "All moneys paid to the treasurer under this chapter, except the said £14,500, shall form part of the general revenues, and be appropriated as such."

Sect. 4. "The Governor in Council may expend out of the gross proceeds of such hereditary and other revenues and such sales, the sums of money which from time to time they may deem necessary for the prudent management, protection and collection thereof."

Sect. 5. "The Governor shall, within fourteen days from the opening of every session of the Legislature, cause to be laid before the Assembly a detailed account for the previous year of all the particulars of the income and expenditure of, and relating to the said revenues," etc.

Sect. 6. "All grants, leases, etc., by this chapter declared to be under the control of the Legislature, shall be void unless the same be made upon sale or lease to the highest bidder at public auction, after due notice in the *Royal Gazette*, and the consideration thereof be made payable to Her Majesty. . . . . ."

Sect. 7. "Nothing in this chapter shall impair or affect any powers of control, management, or direction which have been or may be exercised by the Crown, or by other lawful warrant, relative to any proceedings for the recovery of any such revenues, or to compensation made or to be made on account of any of the same, or

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to any remission, mitigation or pardon of any penalties, fines, or forfeitures, incurred or to be incurred, or to any other lawful act, matter, or thing which has been or may be done touching the said revenues, or to disable Her Majesty from making any grant or restitution of any estate, or of the produce thereof, to which Her Majesty hath or shall become entitled by escheat for want of heirs, or by reason of any forfeiture, or of the same having been purchased by or for the use of an alien, or to make any grant or distribution of any personal property devolved on the Crown for the want of next of kin or personal representatives of any deceased person ; but such rights and powers shall continue to be exercised and enjoyed in as ample a manner as if this chapter had not been made, and as the same have or might have been heretofore enjoyed by the Crown ; but the moneys arising from the full exercise and enjoyment of the rights and powers aforesaid shall be a part of the joint revenues at the disposal of the General Assembly, subject to the restrictions hereinafter provided."

Sect. 8. "Nothing herein shall annul or prejudice any sale, purchase, etc., which, on or before the 17th day of July, 1837, has been made, given, effected, or created, but the same shall remain good and valid."

[630] This Act, cited with so much confidence by Mr. McDougall, as supporting the claims of the Dominion, very clearly establishes that the lands and casual and territorial revenues surrendered to the Province were to be sold by auction, and that escheated lands might be granted or the proceeds distributed by the Crown, that is by the Executive Government of the Province representing the Crown, without the interference of the Local Legislature ; and in the Province of New Brunswick anterior to Confederation (and I have been at a loss to discover that it was different in the other Provinces), the exercise of that right, prerogative, or seignorial, as you may choose to call it, was exercised there up to and at the time of Confederation by the Provincial Executive. I may cite the case of the estate of John E. Woolford, who died in 1866, and on whose estate, for want of heirs, administration was granted to a nominee of the Crown, and which estate, real and personal, has been dealt with by the Governor in Council ; and prior to 1866, I may mention the case of the estate of one Nichols, which was dealt with by order of the Governor in Council in New Brunswick ; for as Mr. May, in his Constitutional History of England (1) says, in reference to the

(1) Vol. 2, p. 538.

concession of responsible government to the colonies: "At last she (England), gave freedom and found national sympathy and contentment. . . . Patronage has been surrendered, the disposal of public lands waived by the Crown, and political dominion virtually renounced. In short, their dependence has become little more than nominal, except for purposes of military defence."

This transfer and surrender, as is well known, was much opposed in New Brunswick by the then Lieut.-Governor and his Council; and though the House of Assembly and Legislative Council passed the bill when first presented to it, the Lieut.-Governor refused his assent, whereupon he was recalled, or resigned, and another Governor [631] was sent with instructions to immediately call the Assembly together that the bill might be again submitted to the Local Legislature, which was done, and the bill passed. Extracts from Lord Glenelg's despatch, dated 6th April, 1837, will shew how this Act was viewed by the Imperial authorities at the time.

Extract from despatch dated 6th April, 1837 from Lord Glenelg to Major-Gen. Sir John Harvey: "Fourthly. A further question of great importance having been noticed in Mr. Street's (Mr. Street was then Solicitor-General, and was sent home to press the views of the Governor and his Council on the Colonial Secretary, in opposition to the House of Assembly) letter of the 23rd March, must not be passed over in silence. That gentleman suggests that it is not competent to the King, with the advice and consent of the Legislative Council and Assembly of New Brunswick, to alienate the hereditary revenues of the Crown in such a manner as to bind His Majesty's royal successors. On this topic I limit myself to a general statement, declining as unnecessary, and therefore as unadvisable, the discussion of the wide constitutional principles involved in this inquiry. On careful reflection, I am convinced that Mr. Street's opinion is not well founded. I do not think that the cession which during the last century it has been customary to make to Parliament of the hereditary revenue of the Crown for the life of the reigning Sovereign only is to be understood as an affirmation of the maxim, that the King, Lords and Commons of Great Britain and Ireland are incompetent to conclude a permanent settlement of the question. That the existing practice is founded on the highest grounds of expediency is indeed indisputable, but I do not perceive that the motives which so urgently forbid a permanent alienation of the hereditary revenues of the Crown in this kingdom apply to the case of a British Province on the North American continent. That such

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a cession may be rendered valid by an Act of General Assembly, assented to by His Majesty, and that the enactment of such a colonial law may under some circumstances be judicious and expedient, might readily be shewn from a reference to our colonial history. I allude especially to the case of the Island of Jamaica. The objection, if well founded, would of course apply to a settlement for ten years, as distinctly as if it should be made in perpetuity. Understanding that Messrs. Crane and Wilmot (delegates from the House of Assembly), and Mr. Street, concur in thinking that it would be expedient that the Civil List should be permanently settled, I have [632] His Majesty's commands to acquaint you that, if such should be the opinion of the House of Assembly, you are at liberty to assent to the Civil List Bill with that alteration."

The whole history of this bill, and the controversies in connection therewith, will be found in the despatches, addresses and the proceedings in the journals of the Local Legislature of New Brunswick.

Before this surrender though the title to the public domain was in the Sovereign, and though the revenues derivable therefrom unquestionably formed a part of the territorial revenues of the Crown, there can, I think, be no doubt the practical constitutional principle acted on was, that these lands and the proceeds and revenues thereof, though beyond the control of the Local Legislature, were held and disposed of by the Crown for the benefit of the Provinces in which they were situate; and all grants in connection therewith were issued by the colonial executive in the name of the Crown, under the great seal of the Provinces, and thus in New Brunswick at the time of the surrender there was, as will appear from the documents I have referred to, a surplus of £171,224 unexpended which was also surrendered; and in this connection in the same despatch Lord Glenelg says: "Sixthly. Mr. Street has objected that any surplus funds which at the expiration of the term of ten years may remain in the public treasury, may at that period be claimed by the Assembly, although they would have placed at their disposal all the surplus which has been at present accumulated. I do not perceive the force of this objection. The existing accumulations are surrendered to the House cheerfully; not merely with contentment but with satisfaction. His Majesty can have no other interest in the matter than that the funds should be expended in whatever manner may best advance the welfare of the Province; and on that question His Majesty conceives that reliance may, with far greater safety, be placed on the judgment of the representatives

of the people than on any other advice. The cession of the existing fund is, therefore, not regarded by the King in the light of a sacrifice, but rather in that of a direct advantage. If during the next ten [633] years (supposing the Civil List limited to that time) any new accumulation should take place, it will constitute a saving effected by the frugality of the House of Assembly, to the benefit of which they will have the clearest title."

And to shew how absolutely Crown rights were intended to be subjected to Provincial control, we need only refer to Lord Glenelg's despatch of 29th April, 1837, in which he says "the cession is co-extensive with the powers of the Crown."

As this was the spirit and intention with respect to New Brunswick, it is not disputed that the Crown substantially dealt in a like liberal manner with the other Provinces.

Thus we see that at the time of the union the entire control, management, and disposition of the Crown lands, and the proceeds of the Provincial public domain and casual revenues, were confided to the executive administration of the Provincial Government as representing the Crown, and to the legislative action of the Provincial Legislatures, so that the Crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective Provinces in which they were situate and therefore, when property escheated it became reinvested in the Crown for the use and benefit of the Province, and was treated and dealt with by the Executive Government and Legislatures of the Provinces as part of the public property of the Province, and grantable by the Lieutenant-Governor under the great seal of the Province when the same should be disposed of by the Provincial authorities in the interest of the Province. Has then the B. N. A. Act altered this and deprived the Provinces of the right to public property, which since Confederation may escheat propter defectum sanguinis, and vested the same in the Dominion to form part of the Consolidated Fund of Canada?

[634] In considering the bearing of the B. N. A. Act on this question, it is, in my opinion, necessary to examine and compare several of the provisions of the Act with a considerable degree of critical minuteness.

By sect. 9, the executive government and authority of and over Canada is declared to continue and be vested in the Queen.

By sect. 12, "All powers, authorities and functions which under any Act of the Parliament of Great Britain, or of the Parliament of

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the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the Government of Canada, be vested in and exerciseable by the Governor-General, with the advice or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada."

Sect. 63 provides for the appointment of executive officers for Ontario and Quebec necessitated, no doubt, by reason of the Union of Ontario and Quebec, severed by the B. N. A. Act, rendering a section similar to that relating to the executive government of Nova Scotia and New Brunswick inapplicable, viz.: Sect. 64, which provides that: "The constitution of the executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act," and this is again repeated in sect. 88.

[635] And for the same reason it was necessary to declare the powers to be exercised by Lieutenant-Governors of Ontario and Quebec, which is done by sect. 65, which is as follows: "All powers, authorities and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in,

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and shall, or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the respeective Legislatures of Ontario and Quebec."

And as to the provisions for the appointment of executive officers for Ontario and Quebec, and declaring the powers and duties of such officers, and as to issuing proclamations before and after the Union, we find by sect. 134, until the Legislatures of Ontario and Quebec shall otherwise provide, the Lieutenant-Governors of Ontario and Quebec may each appoint under the great seal of the Province the following officers to hold office during pleasure, inter alia: the Attorney-General, and in the case of Quebec, the Attorney and Solicitor-General; and by sect. 135 it is provided that "Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General (and other officers named), by any law, statute, or [636] ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same, or any of them. . . . ."

By sect. 136: "Until altered by the Lieutenant-Governor in Council, the great seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the Provinces of Upper Canada and Lower Canada respectively, before their union as the Province of Canada."

By sect. 139: "Any proclamation under the great seal of the Province of Canada issued before the Union to take effect at a time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the Union had not been made."

And by sect. 140: "Any proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the great seal of the Province of Canada, whether relating to that Province or to Upper Canada, or to Lower Canada, and which

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is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario, or of Quebec, as its subject-matter requires, under the great seal thereof; and from and after the issue of such proclamation, the same, and the several matters and things therein proclaimed, shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made."

As the Executive Governments of Nova Scotia and New Brunswick were continued these provisions were not necessary as to those Provinces, but these various enactments and the continuance of the Executive Governments of Nova Scotia and New Brunswick very clearly shew that the provincial executive power and authority was to be precisely the same after as before confederation. That whatever executive powers could be exercised or administrative act done in relation to the government of the Provinces respectively by the Lieutenant-Governor of a Province before confederation can be [637] exercised or done by Lieutenant-Governors since confederation, subject, of course, to the provisions of the Act, as is said, in reference to Nova Scotia and New Brunswick, and is expressed in reference to Ontario and Quebec "as far as the same are capable of being exercised after the Union." That is to say, that the Executive Government of the Provinces, as exercised by the Lieutenant-Governors and Executive Councils, until altered by the respective Legislatures continue as before confederation, except so far as the executive powers of the Governor-General over the Dominion of Canada may interfere.

Therefore, when it is claimed that a Lieutenant-Governor and Council are not competent to deal with a matter or do an executive administrative act that was within their competency before confederation, the burthen is cast on those putting forward such a claim to shew clearly from the B. N. A. Act that by express language or by necessary implication the Local Governments have been denuded of that authority, and the power has been placed in the executive authority of the Dominion. Special pains appear to me to have been taken to preserve the autonomy of the Provinces, so far as it could be consistently with a federal union.

To say then that the Lieutenant-Governors, because appointed by the Governor-General, do not in any sense represent the Queen in the government of their Provinces is, in my opinion, a fallacy; they represent the Queen as Lieutenant-Governors did before confederation, in the performance of all executive or administrative acts now left to be performed by Lieutenant-Governors in the Provinces in

the name of the Queen ; and this is notably made apparent in sect. 82, which enacts that "the Lieutenant-Governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument [638] under the great seal of the Province summon and call together the Legislative Assembly of the Province ;" and with reference to which matter, nothing is said in respect to Nova Scotia and New Brunswick, the reason for which is obvious ; the executive authority at confederation continuing to exist, the Lieutenant-Governors of those Provinces were clothed with authority to represent the Queen, and in her name call together the Legislatures ; and also in the section retaining the use of the great seals, for the great seal is never attached to a document except to authenticate an act done in the Queen's name, such as proclamations summoning the Legislatures, commissions appointing the high executive officers of the Province, grants of the public lands, which grants are always issued in the name of the Queen, under the Provincial great seals.

These being the direct enactments in the matter of the executive powers of the Dominion and the Provinces respectively, it is well to look at the distribution of legislative powers ; and as to all matters coming within the classes of subjects enumerated over which the exclusive legislative authority of the Parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with provincial executive authority or property or its incidents, whereas, in the enumeration of the matters coming within the classes of subjects in relation to which the Provincial Legislatures may exclusively make laws, we find, No. 1, "The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor ;" and from this, I think, a fair inference may be drawn, that as the Lieutenant-Governor under certain circumstances and in certain matters having reference to provincial administration represents the Crown, the Provincial Legislatures are not permitted to interfere with this office ; No. 5. [639] "The management and sale of the public lands belonging to the Province, and of the timber and wood thereon ; No, 13. "Property and civil rights in the Province" and No. 16. "Generally all matters of a merely local or private nature in the Province." When we come to the clauses relating to "revenues, debts, assets, taxation," we find, sect. 102, creation of a Consolidated Revenue Fund : "All duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union, had and

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have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated to the public service of Canada in the manner and subject to the charges in this Act provided."

And as I understand the argument, the words "all duties and revenues" in this section are mainly, if not entirely, relied on as vesting in the Dominion the right to escheated estates.

In reading sect. 102 one cannot, in view of the argument which has been so strongly pressed upon us, but be struck with the clear indication that the words "all duties and revenues" are to be read in a limited sense, and are not to apply to all revenues of every nature and description, because in the first place the words are confined to those "over which the respective Legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union had and have power of appropriation," and are expressly restricted by the exception of "such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act." This establishes, to my mind, in the most unequivocal manner, not only that the duties and revenues referred to were to be confined to [640] those over which the Legislatures had power of appropriation, but that with equal clearness the Parliament thereby recognised the existence of revenues other than those over which the Legislature had the power of appropriation to which the words were not to apply, and also that of those revenues over which the Provincial Legislatures had power of appropriation there were reserved portions thereof to the respective Legislatures of the Provinces, and which by the express terms of the section are expressly excepted in like manner as are those to be raised by the Local Legislatures in accordance with the special powers conferred on them by the Act; and all doubt on this point is set at rest by the provision for the Provincial Consolidated Revenue Funds. In that section this excepted portion is thus dealt with: (Section 126.) "Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them

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by this Act, shall in each Province form one Consolidated Revenue Fund, to be appropriated for the public service of the Province."

Here we see that while by sect. 102 the duties and revenues are confined to those over which the respective Local Legislatures had power of appropriation, subject to the exception therein contained, this sect. 126 recognises as having been reserved, not only duties and revenues to the Legislatures of the Provinces, but expressly speaks of duties and revenues reserved to the respective Governments as well as Legislatures of the Provinces ; and especially in view of the very strongly urged argument by Mr. McDougall, that the revenues should be at the disposal of the Dominion Executive to be granted by the representative of the Crown to those having moral claims on the intestate (in this case his illegitimate son), the last words of sect. 102 would seem to shew that the revenues therein referred to [641] are not revenues that had been or were to be disposed of, because the language is, "shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided ;" and as to the appropriation of this Dominion Consolidated Fund, after, by sect. 103, 104 and 105, charging the same with the costs, etc., of collection, etc., the interests of the Provincial public debts, etc., the salary of the Governor-General, the appropriation from time to time is, by sect. 106 thus provided for : "Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service," thereby ignoring any right in the Executive to deal with this fund in the manner the Crown dealt with the hereditary revenues of the Crown, or in any manner other than through the instrumentality of Parliament, and therefore the provision would work in a manner the exact opposite of that for which Mr. McDougall contends ; for if escheated estates are held to continue to form part of the Provincial public property, and to be dealt with after confederation as it was before, as the Provincial Executives before confederation granted such estates like all other public lands without the intervention of the Legislatures, they would still be in a position to do so, and so to deal with equitable and moral claims as sect. 3 of the New Brunswick Act contemplates the Crown as represented by the Provincial Executive should do ; but if these estates pass under the words duties and revenues, and are to form part of the Consolidated Revenue Fund of Canada, they are withdrawn from executive control and must be appropriated, as it is enacted the Consolidated

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Fund of Canada shall be, by the Parliament of Canada, for the public service of Canada. In looking through the Act we look in vain [642] for any Provincial revenues granted to the Dominion but those from which the revenues intended to be reserved to the Provinces are expressly exempted ; and though there are no duties or revenues in express specific terms reserved to the Legislatures of the Provinces of Ontario and Quebec, Nova Scotia and New Brunswick, nor to the Provinces individually, if we exempt the lumber dues in New Brunswick, as by this Act it is clearly expressed that there were revenues intended to be, and that are reserved to the Provinces, the irresistible inference is, that there must be revenues which arise from or are incident to or growing out of the property reserved to the Provinces. If we refer to the provisions with reference to the distribution of Provincial property, we find that as to the Dominion, by sect. 107, "All stocks, cash, banker's balances and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union ;" and by sect. 108, "The public works and property of each Province enumerated in the third schedule to this Act shall be the property of Canada."

"THE THIRD SCHEDULE.

"*Provincial Public Works and Property to be the Property of Canada.*

1. Canals, with lands and water-power connected therewith.
2. Public harbours.
3. Lighthouses and piers and Sable Island.
4. Steamboats, dredges and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages and other debts due by Railway companies.
7. Military roads.
8. Custom houses, post-offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government and known as Ordnance property.
10. Armouries, drill sheds, military clothing and munitions of war, and lands set apart for general public purposes."

[643] These are all the provisions to be found in reference to the vesting of Provincial property in the Dominion. With respect to

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the Provinces, sect. 117 provides that "The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country." Sect. 109 provides that "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

The executive and legislative powers of the Dominion are large, and so of necessity should be, and while it behoves all Courts in the Dominion to recognise and give full force and effect to all executive and legislative acts within the scope of such powers, it is at the same time equally the duty of all Courts, especially this appellate tribunal, to recognise and preserve to the executive governments and Local Legislatures of the Provinces their just rights, whether political or proprietary, and not to permit the Provinces to be deprived of their local and territorial rights on the plea that Lieutenant-Governors in no sense represent the Crown, and therefore all seignorial or prerogative rights, or rights enforceable as seignorial or prerogative rights, of necessity belong to the Dominion.

While I do not think it can be for a moment contended that the Lieutenant-Governors under confederation represent the Crown as the Lieutenant-Governors before confederation did, I think it must be conceded that Lieutenant-Governors since confederation do [644] represent the Crown, though doubtless in a modified manner.

In my opinion it was not intended by the B. N. A. Act to deprive the Provinces of the executive and legislative control over the public property of the Province, or the incidents of such property, or other matters of a purely local nature, except such as are specifically taken from them, and that within the scope of the executive and legislative powers confided to the Dominion and Provinces respectively they are separate and independent, neither having any right to interfere with or intrude on those of the other; and while I find a clear expressed intention of Parliament to continue to the Provinces all proprietary and territorial rights in all "their respective public property" not specifically disposed of by the Act which belonged to them at confederation, and which the term "public property," as

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used in the 117th sect. in connection with the other sections of the Act to which I have referred, I think may be read as covering all proprietary rights and incidents of property of every nature and description, I can find no such clear indication of the intention of Parliament to denude the Provinces of those incidents in the nature of reversions pertaining to their proprietary rights in the public property, such as are escheats, and to transfer them to the Dominion Government to be disposed of as part of the consolidated revenue of the Dominion by the Parliament of the Dominion.

I cannot bring my mind to the conclusion that it was intended that the lands and their accessories or incidents should be separated and the lands should belong to the Provinces and the reversionary or accessory interest to the Dominion; that though the Crown has surrendered all its rights in the property and the revenues derivable therefrom to the Provinces, when the land escheats for want of [655] heirs, and the property reverts to the original grantor, it is not to revert to be held as it was at the time of the grant made for the benefit of the Province, but for the benefit of the Dominion which never had any interest in the lands whatever; that while the Provinces are to retain their public property and have the management and sale of the lands and of the timber and wood thereon, the public property and lands, reinvesting by reason of the want of heirs, should become the property of the Dominion, and so there should be, growing out of and resulting from the tenure of the public lands belonging to the Provinces, public lands belonging to the Dominion, and subject to its legislation.

I do not think, from a most careful consideration of the B.N.A. Act, that it could have been the intention of Parliament that while the public properties, and the revenues and proceeds from the disposition thereof, should be retained by the Provinces, and they so continue to retain the position occupied by the surrender to them of the Crown rights, that on escheat, the escheated lands should not revert to the Province, but instead thereof should belong to the Dominion, and so the management, control and disposition of what are commonly called the Crown lands or public domain in the Provinces consequently be divided, by the withdrawal of the escheated lands from the control of the government and legislation of the Provinces, and vested in the Parliament of the Dominion. I find no expressions in the B. N. A. Act that the Dominion were to be proprietors by virtue of the Act of any Crown lands in the Provinces or any legislative power granted them to deal with any such lands, excepting always the

properties specially named, such as beacons, lighthouses and Sable Island, lands reserved for the Indians and public works and property specifically enumerated in the third Schedule, together [646] with such other Provincial lands and public property as the Dominion may require and assume for fortifications or for the defence of the country.

The Crown having surrendered to the Provinces the Crown lands and all casual and territorial revenues incident thereto, or growing thereout, the Provinces, so far as the original ownership and beneficial interest in the lands and the incidents thereof is concerned, have by such surrender been placed in the position of the Crown, and therefore when lands granted cease to have any owner propter defectum sanguinis, or propter delictum tenentis, they revert to the Crown, the original grantor, but to be held as the property and for the benefit of the Provinces.

This was so at confederation ; the B. N. A. Act in no way changed the tenure by which these lands were held ; on the contrary, it was enacted the several Provinces should retain their public property, and, as a necessary consequence, their incidents and reversionary interest therein. If the Crown has then surrendered the land and its reversionary interest therein to the Provinces, as no interest in the land has been vested in the Dominion, it is difficult to understand how they could have a reversion in such lands ; in fact, it is a contradiction in terms to say that the lands never owned by the Dominion could revert to it by reason of a failure of heirs, or propter delictum tenentis ; and surely nothing but the most unequivocal words could prevent the land from reverting to the original grantor to be held for the benefit of the Province, to whom the rights of the Crown, the original grantor, had been surrendered ; in other words, to be placed in the same position and held by the Crown for the benefit of the Province as if they never had been granted. When then the property reverts to the Crown, I can [647] discover nothing in this to change the purposes for which, under the surrender by the Crown to the Provinces, it was to be held by the Crown as represented by the Lieutenant-Governor and the Executive of the Provinces respectively.

I think the terms "all duties and revenues," in sect. 102, under which it is claimed these escheated estates pass to the Dominion, refer to the ordinary duties and revenues, such as customs, impost and excise, and the like, which were at the sole disposal of and subject to direct appropriation by the Legislature, and not lands

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which by accident fall to the lord, or those representing the lord, as is said by Coke (1), "Escheat is a word of art, and derived from the French word escheat (id est) cadere, excidere or accidere, and signifieth properly when by accident the lands fall to the lord of whom they are holden." In other words, not casual, accidental or extraordinary revenues which come in the shape of land, and which lands are managed and granted and disposed of by the Executive without the intervention of the Legislature, and under certain circumstances without even the proceeds being subject to legislative action, as in the case of lands donated to those who may by reason of connection with the deceased or other reasons have a special claim on the clemency and favour of the Crown represented by the Provincial executive.

Very strong observations were made as to the manner in which the Government of Ontario had dealt with a portion of this estate and would probably deal with that in controversy, if it was now decided that the disposition of the estate belonged to the Provincial Government. With considerations of this kind we have clearly nothing to do. Though very pointedly and earnestly put forward by Mr. McDougall, in his very able and ingenious address, that those connected with the estate, and who had therefore a moral or equitable claim to consideration, would be seriously aggrieved and [647] injured by holding that the disposition of an escheated estate belonged to the Provincial and not to the Dominion authorities, this proposition has not commended itself to my mind in the way it appears to have so forcibly impressed Mr. McDougall, because I can see no reason whatever why in a case such as this the Provincial executive should be guided or should act on any different principle whatever in regard to the disposal of escheated estates from those that would govern the Dominion executive; on the contrary, it seems to me that precisely the same principles and considerations that should influence and govern the one should guide and determine the action of the other; and it must be borne in mind that there may be many escheats where no circumstances exist calling for any special action, and therefore in the older books we find it stated, "that it is the ordinary course for the Crown *upon petition* to give a lease or grant to the party discovering an escheat with a view to encourage discovery" (1 Chitty's Gen. Pr. 280, citing 7 Ves. 71, and 6 Ves. 809).

(1) Lib. I., c. 1, s. 4 (13 ed.).

For these reasons I think the conclusion arrived at by the Court of Appeal of Ontario is correct, and this appeal should be dismissed with costs.

STRONG, J., concurred with the Chief Justice.

[*Translated.*]

FOURNIER, J.:—

The question to be decided in this case is whether the government of Ontario or that of the Dominion is under our existing constitution entitled to escheated property. Everyone agrees in recognising that escheat (la desherence) is a royal prerogative which can only be exercised by the Queen herself or by those to whom she has specially delegated her powers in this behalf.

Whatever may be the origin and nature of escheat it must be admitted that in the Province of Ontario where the feudal system has [649] never existed it is less an incident of the tenure of land than a fiscal prerogative granted to the Sovereign by the English constitution as a source of revenue. It is thus that Blackstone (1) styles it, classing it among the different sources of revenue of the Sovereign: "The Kings *fiscal* prerogatives, or such as regard his revenue; which the British constitution has vested in the royal person, in order to support his dignity and maintain his power."

On page 303 at paragraph 17 he defines as follows the prerogative of escheat: "Another branch of the king's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom."

This authority establishes three propositions of importance for the decision of the question under consideration—(1) that escheat is a royal prerogative; (2) that it is a source of revenue to the Sovereign; (3) that in the eye of the law the Sovereign is considered the original proprietor of all the lands in the kingdom.

In the legislation prior to the Imperial Statute 1 Wm. IV. c. 25, the provisions relating to escheat or the appropriation of the property and revenue arising therefrom have not affected the preroga-

(1) Vol. 1, p. 281.

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tive of the Crown. The Statutes 39 & 40 Geo. III., 59 Geo. III. and 6 Wm. IV. were not passed in order to vest in the Crown any new rights, nor yet to diminish those which it already possessed over that kind of property, but to facilitate their exercise. This property is not regarded in any other light than as that of the Crown. The 59 Geo. III., c. 94, s. 3, declares that the surplus from the sale of this property, after the execution of the orders of His Majesty, [650] "shall be paid to the Commissioners of His Majesty's land Revenue." The prerogative is left untouched, and the property arising therefrom retains its character of revenue.

It was only by the 1 Wm. IV., c. 25 that the destination of this source of revenue as well as the other rights, hereditary, casual, territorial and others specially attached to the Crown was alienated in exchange for the civil list. It was during the continuance of that reign to form part of the consolidated fund of the United Kingdom, under the conditions and reservations specified in this Act, one of these conditions is thus expressed: "It being the true intent and meaning of this Act that the said rights and powers shall not in any degree be abridged, restrained, affected or prejudiced in any manner whatsoever, but only that the money accruing to the Crown after the full and free exercise of the enjoyment of the said rights and powers, subject as aforesaid, shall, during His Majesty's life time, be carried to and made part of the consolidated fund of the United Kingdom." Such is still in virtue of the provisions of the Imperial Act, 1 & 2 Vict., c. 2, the disposition of the rights and revenues specially attached to the Crown and among others those arising from escheat.

The first change made in the appropriation of the hereditary revenues of the Crown, in the Provinces which now form the Dominion of Canada, was introduced by the Act of New Brunswick, Con. Stat. N.B., Tit. 3, c. 5, the provisions of which are almost the same as those of the 1 Wm. IV., c. 25. Similar provisions were afterwards inserted in the Act of Union of Upper and Lower Canada in 1840. At a later date these were modified by the subsequent statutes cited in detail in the argument of the learned counsel for the appellant. It follows from the condition of the legislation at the time of Confederation that the revenues arising from escheat belonged at the time of the passing of the B. N. A. Act to united Canada. This [651] proposition being admitted on all sides even by the learned counsel for the appellant nothing more remains than to determine whether the B. N. A. Act has not disposed of it as of the other Provincial revenues in favour of the Federal Government.

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In my opinion the decision of the question under consideration is to be found entirely in sect. 102, which is thus expressed: "All duties and revenues over which the respective legislatures of Canada, Nova Scotia and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner, and subject to the charges, in this Act provided."

According to this section, all the duties (tous les droits) and revenues at the disposal of the legislatures are to form the consolidated revenue fund of Canada, subject to the two exceptions therein mentioned.

Property arising from escheat forms without doubt a source of public revenue, since the Crown has alienated it in virtue of the laws respecting the civil list; this revenue must be included in the grant made to the Dominion in general terms of all the duties and revenues of the Provinces. The only exception to this general disposition made in favour of the Provinces is that of the revenues which are reserved to them by the constitutional Act, and which they can raise in virtue of the special powers therein conferred on them. Sect. 126, which creates the Consolidated fund of the Provinces, declares that it shall be composed of the duties and revenues over which before the Union they had power of appropriation, and which are reserved to the respective governments or legislatures. These two sections agree in declaring that all the revenues of the Provinces except those which are specially reserved to them by the constitutional Act shall belong to the federal consolidated fund. In order [652] to maintain that the revenue arising from escheat belongs to the Provinces, it would then be necessary to find in the constitutional Act a reservation to that effect, whereas there is no such reservation. The sources of revenue of the Provinces are pointed out in sub-sects. 2, 3 and 9 of sect. 92, and in sect. 118, which grants a subsidy to each Province,—but none of these sections contains any special reservation which can possibly include the revenue arising from escheat. The only special reservation to be found is that contained in sect. 124, reserving to New Brunswick its privilege of levying on lumber the duties established by one of its laws passed before the Union. An exception which has no other effect than to confirm the genera principle of sect. 102.

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In order to support his claim to the benefit of escheat the respondent invokes still another plea deduced from certain dispositions of the B. N. A. Act. He asserts that sects. 109 and 116 have effected in favour of the Provinces a legislative transfer of this prerogative.

By sect. 109 "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

From the declaration contained in this section that all lands and royalties (reserves royales) belonging to the different Provinces at the Union shall continue to belong to them, the respondent infers that the direct property (domaine direct) of the Crown in all public [653] lands, has been transferred to the Provinces, and that one of the results of this transfer, is that escheated property ought to revert to the Provinces. But the transfer is neither so general nor so absolute as the respondent asserts. It is restrained and qualified by the expressions, "lands, etc., belonging, etc., at the Union." These terms evidently admit of nothing more than a confirmation of the limited ownership of the public lands such as it then was—the power of the Provinces over these lands is in no way increased—no new power is added to those which they already had—no new prerogative is granted to them. The power remained what it was before, as is shewn by sub-sect. 5, of sect. 92, restricted to the management and sale of the public lands belonging to the Province, and of the timber and wood thereon.

Their power over the lands is thus actually what it was before confederation, and nothing more. In order to ascertain what is at present this power, it is necessary to go back to the prior legislation, as well imperial as provincial, on this subject. From the examination which I have made of this legislation, of which Mr. Justice Gwynne has made so exhaustive a statement that it would be useless to go over the subject again, I am driven to the conclusion that the power of the Provinces over the public lands has not been increased by sect. 109. It is as it was before confederation, a power of management, the Crown never having parted by any imperial or provincial Act in favour of any one, with the direct property

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(domaine direct) belonging to it in the public lands. In this case, it is to the Queen as having still the direct property in the lands that escheated property should revert, if this right is to be regarded as an incident of the tenure of land rather than as a prerogative of the Sovereign.

[654] But the Province of Ontario never having been subject to the feudal system, it is not to the Sovereign as lord of the manor (seigneur) but by the royal prerogative of Sovereignty that the right of reversion properly belongs, by force of the principle which, as Blackstone says, raises the presumption that he is proprietor of all the lands of the kingdom. It is doubtless for this reason that under our present constitution grants of public lands are still made in the name of the Queen. In any case, the argument of reversion founded on the feudal system, if it admitted of application to the Province of Ontario, could only affect immoveable property. What in this case becomes of moveable property ; to whom will it revert ? Is the prerogative to be divided according to the nature of the property,—are the immoveables to belong to the Provinces and the moveables to the Dominion ? This question is sufficient to demonstrate the flaw in the argument founded solely on the right of reversion as an incident of the feudal tenure. It is more logical to recognise that it is in virtue of the royal prerogative that the Sovereign has a right to benefit by every kind of escheated property.

Moreover, supposing that the transfer of the lands was absolute, I hardly understand how it could by itself involve the alienation of a prerogative attached to the person of the Sovereign : It is a well established principle that all legislation affecting the royal prerogatives must be formal and express, or result at least from dispositions which necessarily imply that the legislator intended to modify them.

This principle, so often asserted by the decisions of the Courts in England, has again been quite recently reaffirmed by the Privy Council in the case of *Théberge* v. *Landry* (1).

There is plainly in clause 109 no expression concerning the prerogative nor are its provisions of a nature which necessarily raise a presumption that it has been alienated.

[655] The argument founded on the expression "royalties" in the same sect. 109, which was approved in the case of *Church* v. *Blake* (2) seems to have been abandoned by the learned counsel for the re-

(1) 2 App. Cas., 102; *ante*, Vol. 2, p. 1. (2) 2 Quebec Law Rep. 236.

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spondent. In fact, the term "royalties" is not there used to signify the powers or attributes of royalty. The explanation which has been given of this term by the learned counsel for the appellants is the only correct one. It is evident that this expression refers solely to the rights of percentage or commission which the Crown received before confederation in the Provinces of Nova Scotia and New Brunswick in respect of mining grants. For these reasons, sect. 109 does not appear to me in any way to touch the prerogative in question.

Another argument which has been adopted in this case, and which does not seem to me more conclusive than that based on sect. 109, is one drawn from the power of the legislatures over property and civil rights. Escheat being an interruption of the succession, and the Sovereign only taking the property as ultimus hæres, the legislatures can, it is said, change this order of succession. But escheat is a matter of prerogative and not a question of property or civil right. Besides, the existing order of succession admitting this prerogative in favour of the Sovereign, it would be necessary to shew that the power of legislating with respect to royal prerogatives belongs to the legislatures. This is only going back again to the question with whom rests the sovereign authority under the existing constitution, over the subjects of legislation not specially delegated, a question on which I have already had occasion to give my opinion. I do not think it necessary to return to this question, for I think sect. 102 is enough to determine the question under consideration.

[656] Having read the very elaborate judgment of Mr. Justice Gwynne I have contented myself with indicating shortly the grounds of my agreement with his conclusions, I am therefore of opinion that the appeal should be allowed.

HENRY, J. :

Having fully considered the interesting and highly important interests involved in the discussion and decision of this case, I shall now briefly state the conclusions at which I have arrived.

On the part of the respondent it is claimed that on the failure of heirs of Andrew Mercer, who died intestate, the Province of Ontario became entitled to his estate—both real and personal—as legislative assignee of the Crown.

On the part of the appellants it is contended that no such assignment was made, but that, by the B. N. A. Act, the assignment, if any, was to the Dominion.

If, therefore, the claim of the respondent be not sustained, our judgment must be for the appellants, whether or not the Dominion, by the Act in question, became entitled to the position claimed for Ontario.

If the majority of the Court should be of the opinion that the respondent's claim cannot be allowed, it will be unnecessary, in my opinion, to consider the proposition advanced by the appellants, that the assignment was to the Dominion. It has been contended in other cases that plenary legislative powers were given by the Act mentioned over all subjects and for all objects, either to the Parliament of Canada or to the several Legislatures. I have, in at least one of my judgments, refused to admit the correctness of that proposition ; and have held that we must look to the Act and trace to [657] it the right to legislate in regard to every matter arising for decision. If we always keep in view the consideration that the whole legislative power is given by it, and by it alone—a position requiring no argument to sustain—and determine from that the existence of any legislative power claimed, the solution will, to that extent, be easier, and the decision more likely to be correct. There are, no doubt, many subjects given fully, either to the Dominion or to the Local Legislatures, or in part to each, wherein it is manifest the one or the two. each of the part allotted to it, should have legislative power to deal with the whole of such subjects ; but although that may be properly said to be the general rule, I maintain the existence of cases that should be declared exceptions.

It is not necessary, as I have before said and for the reasons given, to be shewn, that the right claimed by the respondent should appertain to the Dominion. It may be that the latter has no such right ; but that conclusion, in my opinion, should have little weight in the present case. To recover in this action, the exclusive right must be shewn in Ontario. The appellants are entitled to our judgment unless the respondent shews a valid legislative transfer of the prerogative right in question to the Province ; and such a transfer as would deprive the Sovereign of the right to its future exercise. I am induced to make these suggestions, as many of the reasons for arriving at the conclusion that there was no such transfer to the several Provinces composing the Dominion apply with equal force to shew there was none to the Dominion.

I have said that we must seek from the B. N. A. Act, and from that alone, for the sustainment of the respondent's claim.

Our attention was directed at the argument to the position of

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Canada immediately preceding the passage of the Act as regards [658] Crown or waste lands, and also to that of Upper Canada before the union with Lower Canada. Holding, however, the views I do as to the result of the union of the four Provinces in 1867, I am unable to feel that much, if any, weight should be given to an argument founded on the position, as touching the question under consideration, which the Provinces or any of them occupied at any time before confederation, except so far as the Act specially refers to such position. The Imperial Act was not one forced upon the Provinces by an arbitrary proceeding of an overruling legislative body, depriving them, or any of them, of legislative power. In such a case it might be contended that the extent of the deprivation must be ascertained from the Act; and as regards any subject or matter not embraced in it, the power would still remain. Here, however, the case is far different. The Act was passed, as it recites, on the application of the Provinces to give legislative sanction and authority to an agreement entered into on the part of the Provinces for their federal union. The implied, if not expressed, principle acted on was, that all rights and privileges, including legislative as well as others, of each of the Provinces, should be surrendered; and that each should, if the union were consummated, depend subsequently for the exercise of their rights and privileges upon the Imperial Act to be passed, to give effect to the agreement for union entered into. This is patent in the Act itself, and in the resolutions of the delegates upon which it was founded and passed. I could give many reasons, and shew many facts, to prove the correctness of this proposition; but it appears to me only necessary to suggest that if it were intended to be otherwise, we would reasonably expect to find provision made for intended exceptions. The absence of any such is strong presumptive evidence that none were desired.

Sect. 102 of the Act gives to the Dominion the appropriation of [659] "All duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, to form one Consolidated Revenue Fund, to be appropriated for the public service of Canada."

By the terms and provisions of that section all the duties and revenues controlled before the union by the Legislatures of the Provinces, with the exception of the portions reserved by the Act to

the Provinces, were clearly given to the Dominion. If, then, before the union, the right claimed by the respondent was vested in the Provinces, it was transferred to the Dominion by this section, unless we find it reserved in the Act to the Provinces. I think, therefore, that the decision of this case should not be affected by the position of the Provinces, or by their legislation, before the union, with the exception I have before mentioned. If the portions of the revenues reserved to the Provinces cannot be construed to include the right in question, it matters not that it can be satisfactorily and undoubtedly shewn that Ontario possessed it before the union.

The reservation to which I have just referred we find, on reference to the Act, to be "lands, mines, minerals and royalties, belonging to the several Provinces at the Union." "Lands" and "royalties" need only to be referred to in this connection. As to the first, it is contended that by the mere transfer from the Crown to the Provinces, the prerogative right to an escheat, on the failure of heirs, is transferred. The first inquiry naturally is, had the Province of Canada, before the union, that right? If it had not, then it could not be a part of the reservation. It was the duty of the respondent to have pointed out some legislation of the Imperial Parliament abolishing or transferring the prerogative right of the Crown by [660] escheat over lands in the Provinces held in free and common socage, previous to the accession of His Majesty William IV.; or to some such statute repealing the statute passed in the first year of his reign, cap. 25, by which His Majesty surrendered to Parliament, to form part of the Consolidated Fund of the kingdom, His Majesty's interest in the hereditary revenues of the Crown, and in the funds which might be derived from any droits of the Crown or admiralty, from any casual revenues either in His Majesty's foreign possessions or in the United Kingdom; and providing that, after his decease, all the said hereditary revenues should be payable and paid to his heirs and successors; to which was added a proviso, that nothing in the Act should extend, or be construed to extend, in any wise to impair, affect or prejudice any rights or powers of control, management or direction which had been or might be exercised by authority of the Crown relative (amongst other things) "to the granting, disposing of, or leasing any freehold or copyhold property, or the produce or any part of the produce or amount or value of any freehold or copyhold to which His Majesty, or any of his royal predecessors, have or hath, or shall become entitled either by escheat for want of heirs, or by reason of any forfeiture . . . or to the

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granting or distributing of any personal property devolved to the Crown by reason of the want of next of kin or personal representatives, of any deceased person," but that the same should be enjoyed in as full and effectual manner as if that Act had not been passed; the Act declaring that the said rights and powers should not be abridged, restrained, affected or prejudiced in any manner whatever; but only that the moneys accruing to the Crown, after the full and free exercise of the enjoyment of the said rights and powers, subject as aforesaid, should, during His Majesty's life, be carried to and made part of the consolidated fund of the United Kingdom.

[661] The Act of the Province of New Brunswick for the transfer of the hereditary, casual and territorial revenues, and of the lands, woods, mines and royalties, contains similar provisions as to the reservation of the rights of the Crown to make any grant or restitution of any estate, or of the produce thereof, to which it might become entitled by escheat for want of heirs, etc., or to make any grant or distribution of any personal property devolved to the Crown for want of next of kin, etc., and declaring that it was only the moneys arising, after the full and free exercise and enjoyment of the rights reserved, should be carried to and form part of the consolidated revenue of New Brunswick. That Act has been re-enacted, and is still in force.

It could not therefore be successfully contended that in New Brunswick the Local Legislature could legislate upon the subject, as that Province could not claim the right under the provisions of the B. N. A. Act, not having enjoyed or exercised any such right previously, but, on the contrary, expressly legislated against it. Having been specially exempted from the operation of the New Brunswick Act, it may be contended that, inasmuch as the Confederation Act contains no such reservation, it was intended to pass the right claimed; but it will be seen that the terms of the latter are not general, and do not apply at all to the hereditary Crown revenues as such, but specifically refer to lands, mines, minerals and royalties. The argument might be applicable to the grant to the Dominion in its comprehensive terms, if the Provinces had previously such right, but is not applicable to the specific reservation to the Provinces.

Up to the time of the union of Upper and Lower Canada in 1840, it cannot be claimed that either had any claim to control the appropriations of the casual or territorial revenues of the Crown. By the [662] Imperial Act passed to consummate that union, it was pro-

vided that before any Act of the United Provinces, relating to or affecting Her Majesty's prerogative touching the granting of waste lands of the Crown, could receive the royal assent, it was required to be laid before both Houses of the British Parliament for thirty days; and that if either house, during that period, should pass an address asking Her Majesty to withhold her assent, it would not thereafter be lawful for her to give it. And also that any law divesting the Crown of any of its prerogative rights, and vesting them in the Provincial Legislature, must emanate from, or be expressly confirmed by the Imperial Parliament. The latter provision, I take, governed the Province of Canada up to the Confederation Act, and when on one occasion a Provincial Act was assented to—as I presume inadvertently—without the Act having been laid before both Houses of Parliament as required, a ratifying Act of the Imperial Parliament was passed as necessary to validate it. I can find no legislation of the Imperial Parliament since to change that position of the matter.

It is contended that, inasmuch as the "management and sale" of Crown lands is vested in the Local Legislatures, it is more reasonable to assume it to have been intended to include the right to acquire a title again by escheat, rather than that the Dominion should take it. That was however, a matter more for those who procured the passage of the Act, and for the Parliament that passed it, than for us. We are not to say what the provision should have been, but what it is. If I were satisfied that the prerogative right in question was in reality transferred by the Confederation Act, I should be much more inclined to conclude that it was to the Dominion, by force of the general terms of the grant to it, than to the Provinces by the restrictive terms of the grant to them. By sect. 102 it will [663] however be seen that the grant to the Dominion is limited to the "duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union had and have power of appropriation." If therefore the Legislatures of those Provinces had not, before or at the union, the right to deal with the subject matter now in question, it cannot be contended that it passed to the Dominion by virtue of that section. If such should be found to be the case it will, I have no doubt, be found to make no practical difference, as we have every reason to assume the right will be exercised by the Sovereign as recommended and suggested by her representative in the Dominion.

The Imperial Parliament has never, as far as I have been able to

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discover, attempted to deal with the peculiar prerogatives of the Crown until previously voluntarily surrendered by the Sovereign; and with that now under consideration the British Parliament has not in any way interfered. If the Province of Ontario should be found right in dealing with it, a position will be attained by it which, as far as I can discover, has not been reached in any other part of Her Majesty's dominions.

It is admitted that up to 1840 the prerogative right to escheat in cases like the present vested in Her Majesty the Queen. If previous to that an estate was left without heirs, the Queen would take the title. She would not, however, take it merely as a source of revenue, for such was seldom appropriated for that purpose. Up to that time the title and control of all public or waste lands was in the Queen. The Province had no title thereto, and the patents were from the Queen. Under what rule or upon what principle could the Province claim, through an escheat, an estate it never before owned. Escheat is by law defined to be "an obstruction of the course of [644] descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee." If that definition be correct, and I cannot think it will be doubted, then in respect of all lands granted, or patented, previous to 1840, the Province could, by no possibility that I can discover, claim as the original grantor, or lord of the fee. If, indeed, the patent had been shewn to have issued since 1867, when the Confederation Act was passed, it might be more interesting to consider and apply to it the doctrine of escheat than under existing circumstances, and to decide whether or not the Act transferred the right claimed. If, however, we were expected to decide that question, it should have been submitted to us by evidence shewing the patent to have issued since the Confederation Act came into operation. That is not the case before us, and I need not speak positively as to it, but will content myself by saying that for other reasons given, I am of opinion that, even in that case, the respondent would fail in sustaining his claims.

It was contended on the part of the respondent that it could not be, that while the land, before being granted, was held by Her Majesty for the use of the Province of Ontario, yet upon, or after, the grant in fee simple, the reversionary estate would be held by Her Majesty for the use of the Dominion of Canada. The answer to that proposition is, that after the grant Her Majesty had no substantial

interest, such as a reversion on the expiration of a lease. The whole estate was transferred without any reserve, or any provision for a reversion. Her Majesty held not the smallest estate known to the law in it. By the unforeseen accident of the failure of heirs, or by a forfeiture she again becomes entitled, but in the meantime is neither the owner nor the trustee of any other in regard to it. She [665] takes it in her own right as the original grantor, having had before the forfeiture or failure of heirs no title whatever. By English law and practice she can dispose of that title when accrued as she pleases, independent of parliamentary control. In the large majority of cases, however, as others lose by the accident which gives her title, she refuses the personal benefit caused by it, and restores, or rather grants, the subject-matter to those who, but for the accident, would most probably have succeeded to it. The power to remedy the injurious result of such an accident in many cases that happen, must be highly prized by any right feeling Sovereign ; and it is one not yet controlled by imperial legislation. It must, therefore, have been considered wise and proper that such should continue to be exercised.

On the part of the respondent it was presented to us simply as a matter of revenue, as between the Dominion and the Provinces. I view it very differently ; and think myself bound to uphold a prerogative right, the exercise of which is more likely to be less exacting than if otherwise held—and which has been so long enjoyed with apparent satisfaction in the United Kingdom—until it is made satisfactorily to appear that it no longer exists.

I think such transfer should not be adjudged by a speculative construction of a doubtful statute, but by a most clear and positive enactment. Besides, it is a well-known rule that the Sovereign is bound by no statute unless specially named therein, and that any statute affecting adversely the prerogative rights of the Sovereign does not bind him unless there are express words indicative of that object. If that rule of law be not violated, the grant of the lands, mines, minerals and royalties belonging to the Provinces at the [666] union in 1867 cannot be adjudged to affect in any way the r yal prerogative through which lands, by escheat for want of heirs, become vested in the Sovereign. That doctrine was acted upon and declared in force by the Privy Council in a comparatively late case (1) and cited by the counsel of the appellants at the argument.

(1) *Theberge* v. *Landry*, 2 App. Cas. 102; *ante*, vol. 2, p. 1.

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Again it is claimed that the right in question is given to the Provinces through the transfer by the Act of the subject-matter termed "royalties." The objections last urged will apply with equal force to that subject. The term "royalties" is of very general import and very comprehensive; but it cannot be contended in this case that it includes the transfer of all that might come under that designation. "Royalties" as to mines is well understood in England to be the sums paid to the Sovereign for the right to work the royal mines of gold and silver; and to the owner of private lands, for the right to work mines of the inferior metals, coal, etc. In Nova Scotia and New Brunswick, if not in the other Provinces, mines and minerals were at the time of the union being worked; and, in Nova Scotia, a revenue therefrom was derived by the government and which, in the Acts of that Province, were called "royalties." That the income thus derived should be continued to that Province, it was necessary that provision therefor should be made; and the use of the term was apparently intended for that purpose, and, at the same time, to give to the other Provinces the continuance of the same right, where such was previously enjoyed. The provision of the Act had therefore sufficient in the fact I have stated to furnish a subject-matter to which it could be referable, and upon which it could operate without giving it any additional or more extended application. The object was to secure to the Provinces something at once available for revenue to be appropriated [667] by them in their Legislatures, and by their several governments, for public purposes. It does not, however, follow that the words used in the provision should be adjudged to include the prerogative right of the Sovereign in respect of any title she might obtain by the accident of a person dying intestate without heirs. Such an assumption as the latter is quite unnecessary to give operation to the provision; and for the many reasons I have given, I think it does not include what is claimed; nor can I arrive at the conclusion that such was intended. These views are in accordance in many respects with those I expressed in the case of *Lenoir* v. *Ritchie*. (1) I may add, that in that case they were not alone my views, but those of all my learned brethren who heard and decided it; and I have heard nothing since tending to change or weaken them. After giving my views, as I have done, in reference to the right in question, I need hardly say that I consider the Act of the Province of Ontario in relation thereto ultra vires. I must, therefore, in accord-

(1) 3 Can. S. C. R. 575; *ante*, vol. 1, p. 488.

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ance with those views, decide that the respondent has not established the position upon which his right to recover in the suit is based; that the judgment appealed from should be reversed, and that our judgment should be for the appellant, with costs.

TASCHEREAU, J. :—

Though I have not failed to give the able argumentation of the learned counsel heard before us on the part of the respondent in this cause the consideration it deserved, I have been unable to alter my views on the question submitted as I expressed them in the *Fraser Case* (1) where the same question was before me in the Superior Court of Kamouraska, and I am still of opinion that under [668] the B. N. A. Act the right to escheats propter defectum sanguinis belongs exclusively to the federal power. As this last case is fully reported, I have not written down at full length the reasons upon which I have come to a conclusion in the present case. This, however, would, under the circumstances, have been useless. I concur entirely with what my brother Gwynne says on the construction to be given to the word "royalties," and to the word "lands" in sect. 109 of the B. N. A. Act, as well as with what he says on the doctrine of reversion relied upon by the respondent. I may remark that this doctrine of reversion, and the reasons given in the present case by the Ontario Court of Appeal applicable to real estate, do not support the Quebec Court of Appeal in the *Fraser case*, (1) where the question as submitted related to personal as well as real estate. To say, as has been said, that as escheats fall within the words "property and civil rights in the Province," they belong to the local power, is a petitio principii. It is taking for granted that they do not belong to the Crown, to the federal power; for, if they belong to the federal, they, of course, do not fall under the words "property and civil rights in the Province," and they cannot in any shape whatsoever be legislated upon by the local power. Sect. 117 of the B. N. A. Act, relied upon by some of the Judges in the Quebec Court of Appeal, has nothing to do with the question, and was not relied upon by the respondent before this Court. As to the word "royalties," to be found in sect. 109 of the B. N. A. Act, which word, according to some of the Judges in the Quebec Court of Appeal, in the *Fraser case* (2), transfers and reserves

(1) 1 Quebec Law Rep. 177, *post*.

(2) 2 Quebec Law Rep. 236; *post*, sub-nom. *Attorney-General of Quebec* v. *Attorney-General of the Dominion*.

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escheats to the Provincial Governments, the respondent has, rightly in my opinion, been unwilling to base his case upon it in his argu- [669] ment before us. To my mind sect. 102 of the B. N. A. Act is conclusive. The Legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union, had power of appropriation over the revenues arising from escheats. Such revenues have not by the B. N. A. Act been reserved to the Provincial Legislatures. Neither can these revenues be said to be raised by the Provincial Legislatures, in accordance with the special powers conferred upon them by the said B. N. A. Act. Then, they form part of the consolidated revenue fund of the Dominion, according to this sect. 102. This is so for real as well as for personal property, as I read the Act. The argument of the respondent, based upon the doctrine of reversion, seems to me defective in that it leaves the personal property of a person deceased intestate without heirs to the Federal Government, whilst it gives his real property to the Local Government.

Any argument which leaves Mercer's personal estate, which is very large, to the Federal Government, whilst it gives his real estate to the Local Government must, as I view it, be wrong, and contrary to a sound interpretation of the B. N. A. Act. The imperial authority cannot have intended such a division of the revenues from escheats. I may also remark that in the Province of Quebec the laws relating to escheats under art. 637 of the Civil Code are not derived from the feudal system, and are anterior to the feudal ages, so that this doctrine of reversion could not apply there. It seems to me that any argument which under the B. N. A. Act does not and cannot apply equally to all the Provinces, must be contrary to the spirit and intent of the B. N. A. Act. This doctrine of reversion seems to me also defective in that it cannot apply to lands which did not belong to the Provinces at the time of the union. Lands which did not form part of the public domain at the union were not [670] given to the Provinces by sect. 109 of the Act. Lands of persons dying intestate without heirs in any one of the Provinces before confederation did not revest in the Province, but escheated to the Sovereign, and belonged to him. He alone had the title to them. The Provinces had been given by the Sovereign, and possessed at the union, power of appropriation over the revenues arising from this right of escheat (the revenues only, not the prerogative right itself, which always remained and remains in the person of the Sovereign), and these revenues by sect. 102 of the Act have

been given to the Dominion Government. All duties and revenues over which the Provinces had, before confederation, power of appropriation are by said sect. 102 given to the Dominion Government, save and except only such portions of said duties and revenues which are by the Act reserved to the Provinces. Sect. 126 distinctly enacts that the Provinces shall have for the future such portions only of said duties and revenues which are by the Act reserved to them. This is clear. For the Dominion, all duties and revenues, except those expressly reserved to the Provinces. For the Provinces, none of said duties and revenues but such portions thereof as are expressly reserved to them. The Provinces have consequently to establish that the Act reserved to them the revenues from escheats. The onus probandi is on them. I fail to see that in any part of the Act these revenues have been so reserved to them.

As to the argument, that as sect. 102 enacts that the duties and revenues therein mentioned shall form part of the consolidated revenue fund of the Dominion, it would be impossible for the Crown to relinquish its rights to revenues from escheats in favour of illegitimate children of the deceased or otherwise, it may be remarked that this argument, if good, would apply equally to the statute [671] (Con. Stat. C., c. 10. s. 5), (1) in which it was also enacted that the duties and revenues, including escheats, would form part of the consolidated revenue of the Province of Canada as constituted before confederation. Yet, under the said Act it has never been doubted that the Crown could relinquish its rights to escheats when it wished so to do.

The question submitted to us by one of the learned counsel for the respondent as to whether the Queen forms part of the Local Legislatures seems to me to have no practical bearing on this case. That, when anything which, according to the principles of the

(1) Con. Stat. C., c. 10, s. 5:—"During the time for which the sums mentioned in the said schedules are severally payable, the same shall be accepted and taken by Her Majesty by way of Civil List instead of all territorial and other revenues at the disposal of the Crown arising in this Province; and three-fifths of the net produce of the said territorial and other revenues at the disposal of the Crown within this Province, before the day last aforesaid, shall be paid over to the account of the said Consolidated Revenue Fund.

(2) "And also during the life of Her Majesty, and for five years after the demise of the Crown, the remaining two-fifths of the net produce of the said territorial and other revenues at the disposal of the Crown within this Province, before the day last aforesaid, shall also be paid over in like manner to the account of the said Consolidated Revenue Fund."

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British Constitution, must be done in Her Majesty's name has to be done by the Lieutenant-Governors of the Provinces, under the B. N. A. Act, they are authorized to do it in Her Majesty's name, and are deemed then to act for Her Majesty, has not, that I remember, been denied by the appellant. But they are not Her Majesty's direct representatives, as the Governor-General is. They have never been considered as such by the Imperial authorities.

"The Lieutenant-Governors of the Provinces of the Dominion, however important locally their functions may be, are a part of the colonial administrative staff, and are more immediately responsible to the Governor-General in Council. They do not hold commissions from the Crown, and neither in power nor privilege resemble those Governors, or even Lieutenant-Governors of colonies, to whom, after special consideration of their personal fitness, the Queen, under the great seal and her own hand and signet, delegates portions of her prerogatives and issues her own instructions," says the Earl of Carnarvon in a despatch to Lord Dufferin, dated January 7th, 1875. (1)

That the Lieutenant-Governors are considered by the Imperial [672] authorities as officers of the Dominion Government seems also clear by the proceedings in the Letellier affair; and the despatch of Sir Michael Hicks-Beach to the Marquis of Lorne on the subject, dated July 3rd, 1879. (2)

The following despatch of the Duke of Buckingham and Chandos to Lord Monck, is written in the same view of the Lieutenant-Governor's position:

"DOWNING STREET, 19th October, 1868.

"MY LORD,—I have under my consideration your Lordship's despatch, No. 170, of the 9th September, submitting the question whether the Lieutenant-Governors of the Provinces within the Dominion of Canada are entitled to salutes from H. M. ships and fortifications within their respective Provinces.

"I have the honour to acquaint you that under the circumstances of the case, the Lieutenant-Governors of the Provinces holding their commissions from the Governor-General will not be entitled to salutes.

"I have the honour to be,

"etc., etc., etc.,

"(Signed) BUCKINGHAM AND CHANDOS.

"The Viscount Monck."

(1) Dominion Sessional Papers, 1875, Vol. 8, No. 7, Sessional Paper 11, p. 38.
(2) Accounts and Papers, Imp. H. C., Vol. 51, p. 127, Session 1878, 1879.

Another despatch from the Secretary of State for the Colonies, dated 7th November, 1872, though it recognises the Lieutenant-Governors should be deemed to be acting directly on behalf of Her Majesty on certain occasions, treats them on ordinary occasions, as representing the Dominion Government.

. . . "and with reference to the question asked by Sir Hastings Doyle, and submitted by Lord Lisgar for my decision, namely, 'whether the Lieutenant-Governors are supposed to be acting on behalf of the Queen,' I have to observe that, while from the nature of their appointment they represent on ordinary occasions the Dominion Government, there are, nevertheless, occasions (such as the opening or closing of a Session of the Provincial Legislature, the celebration of Her Majesty's birthday, the holding of a levee, etc., etc.) on which they should be deemed to be acting directly on behalf of Her Majesty, and the first part of the National Anthem should be played in their presence, . .

"(Signed,) KIMBERLEY."

[673] A reference to the order of precedence established for Canada by Her Majesty shews that the Lieutenant-Governors do not take rank and precedence immediately after the Governor-General, but only after the general commanding Her Majesty's troops, and after the admiral commanding Her Majesty's naval forces on the British North America station.

I do not cite these documents as conclusive evidence for a court of justice, but as worthy of consideration, and to shew that the Imperial authorities and Her Majesty herself consider the Lieutenant-Governors as not generally representing the Sovereign.

However, as I have already stated, though the question has been raised and argued at some length before us, I do not think it can, in any manner, affect this case as I view it. As I have said, I fail to see that the B. N. A. Act reserved or gave to the Provinces the revenues arising from escheats. They consequently must belong to the federal power, and upon this ground I am of opinion to allow this appeal with costs.

I am glad to understand that it was agreed between the parties that whatever should be the judgment of this Court on this question, the case would be carried to the Privy Council. Though these revenues from escheats must amount in fact to a trifle in each of the Provinces, I think it but right for obvious reasons that the final and

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authoritative determination of controversies on the construction of the B. N. A. Act, which is an Imperial statute, should emanate from an imperial judicial authority.

GWYNNE, J. :—

This case was argued before us as one raising a question of the respective rights of the Dominion and Provincial authorities, and as such we have had the advantage [674] of hearing a learned counsel who appeared before us in the interest of the Province of Quebec, as well as two learned counsel who appeared in the interest of the Province of Ontario on the one side, and, upon the other side, learned counsel who appeared before us in the interest of the Dominion.

The particular question is, whether lands in the Province of Ontario escheating to the Crown propter defectum sanguinis come under the management, control and enjoyment of the Dominion or of the Provincial authorities? This question, however, involves the consideration of all property, both freehold and personal, in the several Provinces of the Dominion which escheats to the Crown, and whether such escheat accrues propter defectum sanguinis or propter delictum tenentis, and the conclusion in both cases must be the same.

The learned counsel who appeared before us in the interest of the Province of Quebec addressed to us an argument replete with ability and research for the purpose of establishing a position which he took, namely, that the title which the Crown has to property by escheat is not derived from the feudal tenure, but from a much more ancient law, namely, the old Roman law; but from whatever source derived matters not, for, whatever may be its origin, the learned counsel admitted, as indeed he could not do otherwise, that whether escheat in lands be or be not a species of reversion, whether the title accrues as a sort of caducary succession, the Sovereign taking as ultimus hæres, whether it is of the nature of a title by purchase, or by descent, or partakes of both; whether it accrues propter defectum sanguinis or propter delictum tenentis; whether, in short, the escheated property accrues as an incident to tenure or in virtue of the prerogative royal, and whether it be real or personal property [675] which escheats, all property escheating to the Sovereign does so jure coronæ. The question with which we have to deal is one simply of the construction of the B. N. A. Act, namely, what disposition has that Act (which is the sole charter by which the rights claimed by the Dominion and the Provinces respectively can be

determined) made of property escheating to the Crown? and has it made any distinction between property escheating propter defectum sanguinis and that which escheats propter delictum tenentis? In construing this Act, however, it will be convenient to consider in what manner, and under what designation or form of expression, property of the description in question had been dealt with in prior Acts of Parliament, and what was the precise condition in which that particular species of property was regarded to be and was, at the time of the passing of the B. N. A. Act. By so doing we shall obtain light to assist us in construing the latter Act.

In 1st Anne, c. 1, s. 5, property of this description is spoken of as lands, tenements and hereditaments which may hereafter escheat to Her Majesty, her heirs and successors; and to the end that the land revenues of the Crown might be preserved, improved and increased for the best advantage thereof, it was enacted that no grant should be made of any manors, lands, tenements, tithes, woods or other hereditaments within the Kingdom of England, Dominion of Wales or Town of Berwick-on-Tweed, then belonging or thereafter to belong to Her Majesty, her heirs or successors, whether the same should be in right of the Crown of England, or as part of the Principality of Wales, or of the Duchy or County Palatine of Lancaster, or otherwise howsoever, unless for 31 years or three lives, etc., etc., etc.

[676] Sect. 6 made special provision as to buildings which, as they might require reparation, were allowed to be granted for 50 years or three lives.

Sect. 7 made all other grants which should be made contrary to the provisions of the Act to be void without any inquisition or scire facias. Provided always [s. 8] that the Act or anything therein contained should not extend to disable Her Majesty, her heirs or successors, to make any grant or restitution of any estate or estates thereafter to be forfeited for any treason or felony whatsoever.

The 39 & 40 Geo. 3, c. 88, was an Act passed to remove doubts whether real estate purchased by His Majesty out of his privy purse was subject to the provisions of the above statute of 1st Anne, and it declared that such lands so purchased, or any other lands which might accrue to His Majesty, his heirs or successors, by gift, or devise, or by descent, or otherwise, from any of his ancestors, or any other person not being a King or Queen of Great Britain, were not affected by the above Act, and it provided for the free disposition of all such lands by His Majesty, his heirs and successors.

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By the 12th sect. of that Act it was enacted as follows:

"And whereas divers lands, tenements and hereditaments have become and may hereafter become vested in His Majesty, his heirs and successors, by escheat or otherwise, in right of the Crown, which in the hands of any of His Majesty's subjects would be chargeable with certain trusts, or applicable to certain purposes, and His Majesty, his heirs or successors may be desirous that the same should be applied accordingly, notwithstanding any right which he or they may have to hold the same discharged from such trusts, or without applying the same to such purposes, but by reason of the provisions contained in the said Acts of the first year of her said late Majesty Queen Anne and the thirty-fourth year of His Majesty's reign, doubts may be raised whether His Majesty, his heirs or successors, can direct such application thereof; and whereas divers lands, tenements and hereditaments, as well freehold as copyhold, have escheated and may escheat to His Majesty, his heirs or successors, for want of heirs of the persons last seised thereof or entitled [677] thereto, or by reason of some forfeiture or otherwise, although not forfeited for treason or felony, and it is expedient to enable His Majesty to direct the execution of any such trusts or purposes as aforesaid and to make any grants of any such manors, lands, tenements or hereditaments as aforesaid notwithstanding the provisions contained in the said recited Acts: Be it enacted that it shall be lawful for His Majesty, his heirs and successors, by warrant under his or their sign manual to direct the execution of any trusts or purposes to which any manors, messuages, lands, tenements or hereditaments which have escheated or shall escheat to His Majesty, his heirs or successors shall have been liable at the time the same so escheated respectively, or would have been liable in the hands of any of His Majesty's subjects, and to make any grants of such manors, lands, tenements and hereditaments respectively to any trustee or trustees or otherwise for the execution of such trusts, and to make any grants of any lands, tenements or hereditaments which have escheated or shall escheat as aforesaid to any person or persons, either for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any persons or person making discovery of any such escheat, as to His Majesty, his heirs or successors respectively shall seem fit; anything in the said Acts or any of them to the contrary notwithstanding."

By 47 Geo. 3, c. 24, which was passed to explain and amend

39 & 40 Geo. 3, c. 88, and to remove doubts which had been raised whether the 12th section of that Act applied to the Duchy of Lancaster, the title of the Kings of England to which is separate from the Crown of England, (1) and grants of lands in which were, by a statute of Henry 5, valid only when executed under the seal of the Duchy (2) it was enacted "that in all cases in which His Majesty, his heirs or successors, hath or shall in right of his Crown or of his Duchy of Lancaster become entitled to any freehold or copyhold manors, messuages, lands, tenements or hereditaments, either by escheat for want of heirs, or by reason of any forfeiture, or by reason that the same had been purchased by or for the use of or [678] in trust for any alien or aliens it shall be lawful for His Majesty, his heirs and successors, by warrant under his or their sign manual, or under the seal of the Duchy or County Palatine of Lancaster according to the title to such manors, messuages, lands," etc., etc., to make grants thereof (as in 12th sect. of 39 & 40 Geo. 3, c. 88), anything in 1st Anne and 34 Geo. 3, c. 75, or any other Act to the contrary notwithstanding.

By 59 Geo. 3, c. 94, which was passed to explain and amend 39 & 40 Geo. 3, c. 88, and 47 Geo. 3, c. 24, and to remove doubts which had arisen in certain cases of grants by His Majesty under the said recited Acts, it was enacted "that in all cases in which His Majesty hath, or shall in right of his Crown, or of his Duchy of Lancaster, become entitled to any freehold or copyhold manors, ... either by escheat for want of heirs, or by reason of any forfeiture, or by reason that the same have been or shall be purchased by or for the use of or in trust for any alien or aliens it shall be lawful for His Majesty, his heirs and successors" (as in former Acts) to make grants of such manors, etc., etc., or of any rents and profits then due and in arrear to His Majesty in respect thereof respectively, to any trustee, for the execution of any trusts or for the purpose of restoring the same to any of the family of the person whose estate the same had been, or for carrying into effect any intended grant, or for rewarding discoverers, or to the families of aliens or other persons unconditionally, or in consideration of money, or to a trustee to sell, and that the rents and purchase moneys to arise by any sale should be applied in payment of any costs, charges and expenses incident to any commission for finding the title of His Majesty, and to the making of any such grant, and for carrying the same and the

(1) See *Dyke* v. *Walford*, 5 Moore, P. C. 434.
(2) See 17 Viner's Abr. p. 73, E. b. 2.

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trusts thereof into execution, or in rewarding any person, or the family of any person making discovery of any such escheat, [679] forfeiture, or purchase by an alien or of His Majesty's right and title thereto, or in discharging the whole or any part of the debts due from an alien or any person whose estate or property, any such manors, messuages, etc., etc., have been; or for the use or benefit, in whole or in part, of any such alien or of his family, or of any person adopted by such alien or considered as part of his family, or of any person whose estate or property any such manors, etc., etc., have been, or his family; or of any person adopted or considered by such person as part of his family, "or for all or any of the purposes aforesaid as to His Majesty, his heirs and successors, shall seem fit; and all grants heretofore made by His Majesty which would, under the provisions of this Act, be good are hereby declared to be as good, valid and effectual to all intents and purposes as if the same had been made under the powers, provisions, and authorities of this Act," notwithstanding anything to the contrary in any previous Act.

By the 3rd sect. it was enacted, that in every case where any surplus should remain of any moneys which should arise from any such sale or sales, or which should be paid under the authority of the Act by any person, "after satisfying all such purposes as shall have been ordered and directed by His Majesty, his heirs or successors, under the provisions of this Act, shall be paid to the Commissioners of the land revenue for the time being, to be applied by them in the same way and manner as the money arising from the sale of any manors, messuages, lands, tenements, or hereditaments of or belonging to His Majesty, his heirs or successors, is by the several Acts now in force for the management and improvement of the land revenue of the Crown or any of them, directed to be applied and disposed of."

By the 14th sect. of 1st Geo. 4, c. 1, it was enacted, "that an annual account of all moneys which shall or may hereafter arise and be received for and in respect of any droits of Admiralty or droits [680] of the Crown, ... and from all surplus revenues of Gibraltar, or any other possessions of His Majesty, out of the United Kingdom, and from all other casual revenue or revenues, whether arising in or from any foreign possessions, or in the United Kingdom, and of the application and dispositions of all such moneys or revenues, shall be laid before Parliament on or before the 24th day of March in each year, if Parliament shall be then sitting; or, if Parliament shall not be then sitting, then within 30 days after the then next meeting of Parliament."

By 6 Geo. 4, c. 17, the provisions of 59 Geo. 3, c. 94, were extended to leasehold lands, etc., etc., etc.

In 1829, 10 Geo. 4, c. 50, was passed. This was an Act to consolidate and amend the laws relating to the management of the land revenue of the Crown within England and Ireland, and by the 126th sect. of that Act it was enacted that nothing in the Act should extend, or be deemed or construed to extend, to repeal, interfere with or in any manner affect, any of the powers and provisions of 39 & 40 Geo. 3, c. 88, or of 47 Geo. 3, c. 24, or of 59 Geo. 3, c. 94, or of 6 Geo. 4, c. 17.

And by the 128th sect. it was enacted, "that nothing in this Act contained shall extend, or be construed to extend, in any wise to impair or affect any rights, or powers of control, management or direction, which have been or may be exercised by authority of the Crown, or other lawful warrant relative to any leases, grants, or assurances of any of the small branches of His Majesty's hereditary revenue, or to any suits or proceedings for recovering the same, or to compositions made or to be made on account of any of the said small branches, or to fines taken or to be taken, or to rents, boons and services reserved or to be reserved upon such grants, leases and assurances, or to the mitigation or remission of the same, or to any other lawful act, matter or thing which has been or may be done touching [681] the said branches, but that the said rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual manner to all intents and purposes as if this Act had not been made, and as the same had been or might have been enjoyed by His Majesty up to the time of passing of this Act. . . ."

From this last section it appears to be clear that lands which should escheat to the Crown, whether propter defectum sanguinis or propter delictum tenentis, or which should become forfeited as purchased to the use of or in trust for an alien, were not, and were not regarded as being part of what were known as "the small branches of His Majesty's hereditary revenue:" and that in parliamentary, that is to say in statutory phraseology, this latter term did not comprehend revenue derived from such escheated or forfeited lands.

The law affecting lands accruing to the Crown by escheat and forfeiture remained as appearing in the above recited Acts until the accession of His Majesty King Wm. 4 to the throne in 1830. It will be observed that the above Acts do not profess to affect any personal chattel property escheating to the Crown which continued to be at the absolute disposal of the Sovereign. It will be observed

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also, that the above recited Acts of 39 & 40 Geo. 3, 47 Geo. 3, 59 Geo. 3, and 6 Geo. 4, were not passed for the purpose of vesting in the Crown rights in respect of lands accruing by escheat or forfeiture which the Crown never had before had, but for the purpose of removing the restraint which the provisions of 1st Anne had imposed, or might be supposed to have imposed, upon the power of the Crown over such lands which, but for that statute, would have been absolute. The effect of the recited Acts was to cause to be paid over to the commissioners of His Majesty's land revenues the surplus only of the revenue which might be derived or arise from the sale of any [682] such escheated or forfeited lands, after the full and free exercise by the Crown of its prerogative right of disposing at pleasure and ex speciali gratiâ of the whole of such lands, or of the proceeds of the sale thereof, to all or any of the purposes mentioned in the recited Acts; they were, in fact, Acts passed for the purpose of maintaining the prerogative right of the Crown of graciously restoring such lands to persons who were, or who were considered as being of, or adopted into, the family of the person whose estate the property had been; that gracious exercise of the Sovereign's prerogative right those statutes maintained and preserved.

Whether the language of 39 & 40 Geo. 3, and of the subsequent Acts in amendment thereof, extending as it did to "all cases in which His Majesty, his heirs or successors, hath or shall in right of his Crown become entitled by escheat, etc.," was sufficient to include lands in the colonies escheating to the Sovereign for the time being in right of the Crown, is of no importance at the present day, nor is it necessary for the purpose of this case to inquire and determine, for from what I have already said, it follows, that if those Acts did not apply to lands escheating to the Crown in the colonies the prerogative right of the Crown over such lands to dispose of them at pleasure, and consequently to the gracious purposes indicated in the above recited Acts, remained absolute and unaffected by any Act of Parliament at the time of the accession of His Majesty King Wm. 4 to the throne; for the statute 1st Anne was confined expressly in terms to England and Wales and the Town of Berwick-on-Tweed, and no similar Act affecting the property belonging or accruing in the colonies to the Sovereign jure coronæ had been passed.

I have named above the accession of his late Majesty King Wm. 4 to the throne as being the period when first any revenue derived [683] from the casual source of property, whether real or personal,

escheating to the Crown either propter defectum sanguinis or propter delictum tenentis, was surrendered by the Crown and was incorporated into and made part of the consolidated fund of the United Kingdom.

By 1st Wm. 4, c. 25, after reciting among other things that His Majesty had been graciously pleased to signify to His Majesty's faithful Commons in Parliament assembled, that His Majesty placed without reserve at their disposal His Majesty's interest in the hereditary revenues of the Crown and in those funds which may be derived from any droits of the Crown or Admiralty—from the West India duties, or from any casual revenues either in His Majesty's foreign possessions or in the United Kingdom, it was enacted "that the produce of all the said hereditary rates, duties, payments and revenues in England and Ireland respectively, ...and also the small branches of the hereditary revenue, and the produce of the hereditary casual revenues arising from any droits of Admiralty or droits of the Crown, . . . and from all surplus revenues of Gibraltar, or any other possession of His Majesty out of the United Kingdom, and from all other casual revenues arising either in the foreign possessions of His Majesty or in the United Kingdom, which have accrued since the decease of his said late Majesty, and which shall not have been applied and distributed in the payment of any charge thereupon respectively, or which shall accrue during the life of his present Majesty . . . shall be carried to and made part of the consolidated fund of the United Kingdom of Great Britain and Ireland; and from and after the decease of his present Majesty, . . . all the said hereditary revenues . . . shall be payable and paid to his heirs and successors"; and by the 12th clause it was enacted, "that nothing in this Act contained shall extend, or be construed to extend, in any wise to impair, affect or [684] prejudice any rights or powers of control, management or direction which have been or may be exercised by authority of the Crown, or other lawful warrant, relative to any leases, grants or assurances of any of the said small branches of His Majesty's hereditary revenues, or to any suits or proceedings for recovery of the same, . . . or to any other lawful act, matter or thing which has been, or may be, done touching the said branches, or to the granting of any droits of Admiralty or any droits of the Crown, or any part or proportion of any such droits respectively, as a reward or remuneration to any officer or officers, or other person or persons, seizing or taking the same, or giving any information relating thereto, or to the

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granting, disposing of, or leasing any freehold or copyhold property, or the produce, or any part of the produce, or amount, or value of, any freehold or copyhold to which His Majesty, or any of his royal predecessors, have, or hath, or shall become entitled, either by escheat for want of heirs, or by reason of any forfeiture, . . . or to the granting or distributing of any personal property devolved to the Crown by reason of the want of next of kin or personal representative of any deceased person, but that the same rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual a manner to all intents and purposes as if this Act had not been made, and as the same have been or might have been enjoyed by his said late Majesty George the Fourth at the time of his decease, subject nevertheless to all such restrictions and regulations as were in force by virtue of any Act or Acts of Parliament in relation thereto at the time of the decease of his said late Majesty, it being the true intent and meaning of this Act that the said rights and powers shall not in any degree be abridged, restrained, affected, or prejudiced in any manner whatsoever, but only that the moneys accruing to the Crown, after the full and free exercise and enjoyment of the said rights and powers, subject as aforesaid, shall, during His Majesty's life be [685] carried to and made part of the consolidated fund of the United Kingdom."

Now it will be observed that from the passing of the above statute of Anne until the passing of this Act of 1st Wm. 4, that branch of the revenues of the Crown which arose from escheated or forfeited lands is never spoken of in any Act of Parliament under any other designation or description than as the proceeds of lands "which may hereafter escheat," or of lands "wherein His Majesty hath or hereafter shall become entitled in right of his Crown by escheat or forfeiture." Never in any Act is such property spoken of or dealt with under the bald description of "lands belonging to His Majesty." A distinction also was in statutory phraseology drawn between property known under the name of "the small branches of His Majesty's revenue" and lands accruing to His Majesty by escheat or forfeiture. In 1st Wm. 4, c. 25, the revenues arising from all lands and personal property devolving upon the Sovereign in right of the Crown by escheat or forfeiture, as well as all revenues arising from the "small branches" of his Crown revenue, are dealt with under the name and designation "casual" revenues of the Crown, and henceforth under this term "casua

revenues," the proceeds of all property, whether real or personal, devolving upon the Crown by escheat, is dealt with by Parliament.

The language of this Act 1st Wm. 4, appears to be abundantly ample to comprehend under its operation the territorial and casual revenues accruing to the Crown in the colonies, and in the conflict which arose between the Colonial and Imperial authorities, for the purposes of obtaining for the colonies control over those revenues, certain of the Imperial authorities from time to time questioned the [686] competency of the Crown to assent to any bill passed by the colonial assemblies affecting to deal with those revenues. In April, 1837, as appears by Mr. Forsyth's work intituled "Cases and Opinions on Constitutional Law," p. 156, the then law officers of the Crown in England, Sir John Campbell, afterwards Lord Campbell, and Sir R. M. Rolfe, afterwards Lord Cranworth, in answer to a question submitted to them by Lord Glenelg, then Colonial Minister: "Whether it is in point of law competent to His Majesty, with the advice and consent of the Legislative Council and Assembly of New Brunswick, to render the tracts of wild land in that colony which belong to His Majesty jure coronæ subject to the appropriation of the Legislature of the Province for a fixed period or in perpetuity, in return for a civil list, to be settled on the Crown for a similar term, or in perpetuity, as may be thought best?"—gave it as their opinion that it was competent for His Majesty to make such appropriation of his hereditary revenues in the colony of New Brunswick.

The colony of New Brunswick possessed a constitution, not created by Act of the Imperial Parliament, as that of Lower and Upper Canada was, but created from time to time by the Kings of England in the exercise of their royal prerogative, the legislative authority in which, as in the Imperial Parliament, consisted of the Sovereign, acting with the advice and consent of a Legislative Council and Assembly, the limits of jurisdiction of such legislature not being prescribed by any written charter. Accordingly, in pursuance of this opinion and in the month of July, 1837, an Act framed upon the model of the Imperial Act, 1st Wm. 4, and prepared in England, was passed by the Legislature of New Brunswick, 8 Wm. 4, c. 1, whereby after reciting that "his most gracious Majesty had been pleased to signify to his faithful Commons of New [687] Brunswick, that His Majesty will surrender up to their control and disposal the proceeds of all His Majesty's hereditary, territorial and casual revenues, and of all His Majesty's woods, mines

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and royalties, now in hand, or which may hereafter during the continuance of this Act be collected in this Province, on a sufficient sum being secured to His Majesty, his heirs and successors, for the support of the Civil Government in this Province,"—it was enacted "that the proceeds of all and every the said hereditary, territorial and casual revenues, and the proceeds of all sales and leases of Crown lands, woods, mines and royalties, which have been collected and are now in hand, or which shall be collected hereafter, during the continuance of this Act, (except the moneys which shall be expended in the collection and protection thereof, as specially authorized and provided for by the 4th sect. of this Act,) shall immediately be payable and paid to the Provincial Treasurer, who is hereby authorized to receive the same for the use of this Province; and from and after the expiration of this Act, the proceeds of all the said hereditary, territorial and casual revenues, and of the said lands, woods, mines and royalties, shall revert to and be payable and paid to his said Majesty, his heirs and successors." The Act then granted a civil list of £14,500 per annum, for ten years, from 31st December, 1836, when the Act should expire.

The 4th sect. above referred to provided for the payment of the expenses of management out of the gross revenues, and by the 6th sect. it was among other things enacted that nothing in the Act contained should extend or be construed to extend in any wise "to disable His Majesty, his heirs and successors, to make any grant or restitution of any estate or estates, or of the produce thereof, to which His Majesty hath or shall become entitled by escheat for want of heirs, or by reason of any forfeiture, or by reason of the same having been purchased by or for the use of any alien, or to [688] make any grant or distribution of any personal property devolved to the Crown by reason of the want of next of kin or personal representatives of any deceased person, and that the said rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual manner to all intents and purposes as if this Act had not been made, and as the same have or might have been heretofore enjoyed by the Crown, subject nevertheless to the restrictions and regulations hereinbefore made and provided; it being the true intent and meaning of this Act that the said rights and powers shall not be in any degree abridged or restrained, or affected in any manner whatsoever, but only that the moneys arising from the full and free exercise and enjoyment of them, so subject as aforesaid, shall, during the continuance of this

Act, be carried to and made part of the joint stock revenues at the disposal of the General Assembly of this Province."

The provisions of this Act were re-enacted and made perpetual by Revised Statutes of N. B., title 3, c. 5.

The connection in which the words "Crown lands, woods, mines and royalties" are used in this Act plainly shews that under these words is meant to be designated wholly different property from any accruing to the Crown by reason of escheat or forfeiture, and that the word "royalties" is intended to describe and cover merely moneys, or part of the produce of mines, arising from lease or other disposition of mines. Upon the accession of her present Majesty the Act 1 & 2 Vict., c. 7, was passed, which is identical in its terms with 1st Wm. 4, c. 25.

That the Imperial Parliament, at the time of the reunion of the Provinces of Lower and Upper Canada, was determined not to vest in the Legislature of United Canada the same power and control over the Crown revenues in the Province as the law officers of the Crown, had, in April, 1837, pronounced to be vested in the Legis-
[689] lature of New Brunswick, appears from the constitutional Act 3 & 4 Vict., c. 35. For the Imperial Parliament by that Act itself constituted a Consolidated Fund and a Civil List for the Province of United Canada, and made a special disposition of the revenues at the disposal of the Crown, and restrained the Crown from assenting to any bill passed by the Legislative Council and Assembly, which should in any manner relate to or affect Her Majesty's prerogative touching the granting of waste lands of the Crown within the Province, until 30 days after the same should have been laid before both Houses of the Imperial Parliament, or in case either of the said Houses of Parliament should within the said 30 days address Her Majesty to withhold her assent from any such bill. The clauses providing for a Civil List, namely, the 52nd and 54th, enacted that out of the consolidated revenue fund there should be payable permanently to Her Majesty, her heirs and successors, £45,000 for defraying the salaries of the Governor, Lieut.-Governor, and of the Judges, and Attorney and Solicitor-General, and the expense of the administration of justice, and during the life of Her Majesty, and for five years after the demise of Her Majesty, a further sum of £30,000 for defraying the expenses of the civil government; and that during the time for which the said several sums were payable the same should be accepted and taken by Her Majesty, by way of Civil List, instead of all territorial and other reve-

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nues now at the disposal of the Crown arising in either of the said Provinces of Upper Canada or Lower Canada, or in the Province of Canada, and that three-fifths of the net produce of the said territorial and other revenues now at the disposal of the Crown within the Province of Canada should be paid over to the account of the said consolidated revenue fund, and also during the life of Her Majesty, and for five years after the demise of Her Majesty, the [690] remaining two-fifths of the net produce of the said territorial and other revenues should also be paid over in like manner to the account of the same fund.

The Legislative Assembly of the Province persisted still in endeavouring to procure the recognition of the principle for which they contended, namely, that the colonial Legislature should exercise the like control over the territorial and casual revenues of the Crown arising in the Province as was exercised by the Imperial Parliament over the like revenues arising within the United Kingdom. Accordingly, in 1846, a bill passed the Legislative Assembly and the Legislative Council of the Province which, as coming within the provision of the Act of Union, was transmitted to England for the purpose of being laid, and was laid, upon the table of both Houses of the Imperial Parliament.

By this bill, it was recited, among other things, as follows: "Whereas your Majesty has been most graciously pleased to declare to your faithful Canadian Commons, in Provincial Parliament assembled, your Majesty's gracious desire to owe to the spontaneous liberality of your Canadian people such grant, by way of Civil List, as shall be sufficient to give stability and security to the great civil institutions of the Province, and to provide for the adequate remuneration of able and efficient officers, in the executive, judicial and other departments of your Majesty's public provincial service, the granting of which Civil List constitutionally belongs only to your Majesty's faithful Canadian people in their Provincial Parliament."

The bill provided for the establishment of a consolidated revenue fund for the Province of Canada, in the same terms as had been provided by the 50th sect. of 3 & 4 Vict., c. 35. It then charged upon that consolidated fund permanently a sum not exceeding £34,638 15s. 4d. cy., in lieu of the £45,000 by the 52nd sect. of 3 & 4 Vict. provided, and during the life of Her Majesty, and for five years after the demise of Her Majesty, a sum, not exceeding [691] £39,245 16s. cy., in lieu of £30,000 by the 54th sect. provided; and after making provision for alteration in the salaries

to be attached to certain offices, it enacted that : "During the time for which the said several sums mentioned in the said schedules are severally payable, the same shall be accepted and taken by Her Majesty, by way of Civil List instead of all territorial and other revenues now at the disposal of the Crown, arising in this Province; and that three-fifths of the net produce of the said territorial and other revenues, now at the disposal of the Crown, within this Province, shall be paid over to the account of the said consolidated revenue fund ; and also that during the life of Her Majesty, and for five years after the demise of Her Majesty, the remaining two-fifths of the net produce of the said territorial and other revenues now at the disposal of the Crown within this Province, shall also be paid over in like manner to the account of the said consolidated revenue fund."

By the Imperial Act 10 & 11 Vict., c. 71, Her Majesty was authorized, with the assent of her Privy Council, to assent to the above bill, and it was enacted that if Her Majesty, with the advice of her Privy Council, should assent thereto, then the clauses numbered respectively 50 to 57, both inclusive, of 3 & 4 Vict., c. 35, should be repealed upon and from the day on which the said reserved bill (being first so assented to by Her Majesty in Council) should take effect in the Province. The bill was subsequently assented to and became an Act, 9 Vict., c. 114, of the Provincial Legislature.

The object of the Provincial authorities in procuring the passage of this bill, and the royal assent thereto, as an Act of the Provincial Legislature, was to obtain the recognition of the principle so long contended for, and which is set out in the above extract from the preamble, namely, that the Crown should owe the Provincial Civil List to the Provincial Commons, and that in return therefor the Crown should surrender to the Provincial Legislature the same control and management of the territorial and casual revenues accruing to the Crown within the Province as was exercised and enjoyed by [692] the Imperial Parliament over the like revenues arising within the United Kingdom. To have greater control was never contended for. We can therefore, I think, affirm with great confidence that by the passing of the bill into an Act the Local Legislature never contemplated obtaining, nor, by authorizing the Royal assent to be given to it, did the Imperial Parliament contemplate conferring on the Provincial Legislature, any greater control over, or interest in, the revenues arising from property devolving upon

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the Crown by escheat or forfeiture, than was exercised and enjoyed in England by the Imperial Parliament over the like revenues there, under the 12th sect. of 1st Wm. 4, c. 25, and 1 & 2 Vict., c. 2, by which the jurisdiction was limited to the surplus or "net proceeds," as they are called in the Canadian Act, and in 3 & 4 Vict., c. 35, of those revenues, after the full and free exercise by Her Majesty of her royal prerogative of grace and bounty, as expressed in those sections; and yet it is certainly true that no section similar to the 12th sect. of the above Imperial Acts is inserted in 3 & 4 Vict., c. 35, or in the Canadian Act. This latter Act, however (if the question of Her Majesty's right to have exercised in Canada such her royal prerogative of grace and bounty after the passing of that Act at the time of the passing of the B. N. A. Act, should be material to the determination of the question now before us), will have to be read in the light of three Imperial statutes subsequently passed, viz., 15 & 16 Vict., c. 39, 17 & 18 Vict., c. 118, and 28 & 29 Vict., c. 63. The same observation may be applied to the Act of the Legislature of Nova Scotia, passed in the year 1849, by which the territorial and casual revenues of the Crown arising in that Province were surrendered to the Provincial Legislature. That Act, which appears to have been drafted by a draftsman of a peculiarly [693] and indeed of an excessively cautious cast of mind, after providing for the surrender of all moneys arising from the Crown lands, mines, minerals or royalties of Her Majesty within the Province, proceeds to enact, so as to make assurance doubly sure, that "so soon as this Act shall come into operation, all the right and title of Her Majesty, whether in reversion or otherwise, of, in, to and out of all and singular the mines of gold, silver, coal, iron, ironstone, limestone, slatestone, slaterock, tin, copper, lead and all other mines and minerals and ores within this Province, which by indenture of lease, bearing date on or about the 25th day of August, in the year of Our Lord, 1826, were granted, demised and leased by or on the part of his late Majesty King Geo. 4, to his late royal brother the Duke of York, for the term of 60 years, at and under certain rents and renders therein contained, as by reference to the said lease will at large appear, and also all rents and arrears of rent and returns due or to become or grow due by virtue of the said lease, with all powers, rights and authorities, whether of entry for forfeitures, or breach of condition or otherwise in the said lease reserved or contained, in respect of the breach of any condition thereof, and also all the estate, right and title of Her Majesty, reversionary or otherwise

of, in and to all such coal mines in the Island of Cape Breton, and to all such reserved mines at Pictou which were agreed to be leased and demised by his said late Majesty for the yearly rent of £3,000 sterling . . . and which said mines, under such agreement, are in possession of, and were or are now in operation and worked by or for a certain company called the General Mining Association, and likewise the said yearly rent of £3,000 sterling, and all other rents and reservations by the said agreement reserved or payable, ... and also all mines of gold, silver, iron, coal, ironstone, limestone, slatestone, slaterock, tin, copper, lead and all other mines, minerals and ores within this Province, including the Island of Cape Breton, of which the title is now in Her Majesty, shall be, and the said several enumerated premises are hereby respectively assigned, transferred and surrendered to the disposal of the General Assembly of this Province . . . . to and for such public uses [694] and purposes as in and by any Act of the General Assembly for the time being shall be ordered and directed."

For the purpose of giving effect to this Act, two Acts were subsequently passed by the General Assembly of the Province, the one to be found in the second series of the Revised Statutes of Nova Scotia, chapter 27, intituled "Of the Coal Mines," and the other in the third series of the Revised Statutes, chap. 25, intituled "Of Mines and Minerals," in both of which the Legislature of Nova Scotia shews its understanding of the term "royalties" to be that which is ordinarily attached to it. By the 23rd sect. of the former Act it is enacted that, "the royalties reserved under any lease granted in pursuance of this chapter shall not be less than those now paid by any party holding a lease under the Crown of any mines or minerals in this Province," and by the 47th sect. of the latter Act it is enacted that "on all leases of gold mines and prospecting licenses to search for gold there shall be reserved a royalty of three per cent. upon the gross amount of gold mined," by the 55th sect. that "each licensed millowner shall separate from the yield or produce of gold of each lot or parcel of quartz as crushed, three parts out of every hundred parts of such yield as the portion thereof belonging and payable to Her Majesty as royalty."

By sect. 69, "The lessee of each mine shall be liable for royalty, upon all gold obtained from his mine in any other way than from quartz crushed at licensed mills, but he shall be exempted from any claim in respect of gold obtained from quartz so crushed, the liability of the millowner for such royalty being hereby substituted

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instead of that of the lessee ;" and by sect. 102, " All licenses and leases of mines and minerals, other than gold mines, shall be subject [695] to the following royalties to the Crown, to the use of the Province on the produce thereof, after it has been brought into marketable condition, payable yearly from the period of their respective dates; that is to say, of five per cent. on all such ores and minerals, except gold, iron and coal ; of eight cents on every ton of iron and of ten cents on every ton of 2,240 lbs. of coal, which said royalties shall be paid to such person or persons at such times and in such places as the licenses or leases shall respectively stipulate, or as the Governor in Council may from time to time direct."

By the Imperial Act 15 & 16 Vict. c. 39, after reciting 1st Wm. 4, c. 25, s. 2, and 1st Vict., c. 2, s. 2, and that from the time of the passing of the said Act of 1st Wm. 4, " the lands of the Crown in the colonies (save where special provision has been made in relation thereto by other Acts of Parliament) have been hitherto granted and disposed of, and the moneys arising from the same, whether on sales or otherwise, have been appropriated by or under the authority of the Crown and by and under the authority of the Legislatures of the several colonies, as if the said Acts of the first year of King William the Fourth and of the first year of her present Majesty had not been passed; and whereas doubts have arisen whether the moneys arising as aforesaid in the said colonies may not be considered hereditary casual revenues within the meaning of the said Acts, and whether all or any part of other revenues arising within the said colonies, and being hereditary casual revenues within the meaning of the said Acts, may be lawfully appropriated to public purposes for the benefit of the colonies within which they may have respectively arisen;" and to remove such doubts, it was enacted that:

1. "The provisions of the said recited Acts in relation to the hereditary casual revenues of the Crown shall not extend or be deemed to have extended to the moneys arising from the sale or other disposition of the lands of the Crown in any of Her Majesty's colonies or foreign possessions, nor in any wise invalidate or [696] affect any sale or other disposition already made or hereafter to be made of such lands or any appropriation of the moneys arising from any such sale, or other disposition which might have been lawfully made if such Acts or either of them had not been passed.

2. " Nothing in the said recited Acts contained shall extend or

be deemed to have extended to prevent any appropriation which, if the said Acts had not been passed, might have been lawfully made by or with the assent of the Crown of any casual revenues arising within the colonies or foreign possessions of the Crown (other than droits of the Crown and droits of Admiralty) for or towards any public purposes within the colonies or possessions in which the same respectively may have arisen: provided always that the surplus not applied to such public purposes of such hereditary casual revenues shall be carried to and form part of the said consolidated fund."

From the debate which took place in Parliament at the time of the passing of this Act, its object appears to have been to authorize the appropriation to colonial purposes of the Crown revenues in the colonies arising from waste lands or from mineral treasures, which the Acts of 1st Wm. 4 and 1st Vict. were regarded as appropriating to the consolidated fund of the United Kingdom and to confirm the appropriations which had then already been made of those revenues by Acts of the colonial Legislatures, and to make the above named Imperial Acts apply only to directing the appropriation to the consolidated fund of the United Kingdom of any surplus remaining after the application of whatever might be necessary for the advantage of the colony. What surplus there was expected to be after the appropriation by the colonial Legislatures of what they should, by Act of Parliament assented to by the Crown, declare to be necessary to be expended for the benefit of the colony, it is difficult to understand; but the Act expressly declares that such moneys arising from such revenues as shall not be applied to the public purposes of the colony shall be carried to and form part of the consolidated fund of the United Kingdom. The Acts of 1st [697] Wm. 4 and 1st Vict. being by this Act held to apply so far to such surplus moneys arising from the surrendered Crown revenues within the colonies, it would seem but reasonable to hold that the proviso in the 12th sect. of those Acts which saves to the Crown the exercise of its prerogative royal of grace and bounty should apply also if the question was whether the Crown did or did not possess that prerogative right in Canada immediately before the passing of the B. N. A. Act. There are, moreover, two colonial Acts of those referred to in the preamble of 15 & 16 Vict., c. 39, as disposing of the lands of the Crown in the colonies notwithstanding 1st Wm. 4 and 1st Vict., which it will be proper to refer to in this connection, namely, 4 & 5 Vict., c. 100, and 12 Vict., c. 31, of the

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Acts of the Legislature of Canada (1). By the former of these Acts, intituled "An Act for the disposal of Public Lands," after reciting that it was "expedient to provide by a law applicable to all parts of this Province for the disposal of public lands therein," it was in the 2nd sect. enacted, that, except as thereinafter provided, "no free grant of public land shall be made to any person or persons whomsoever," and by the latter, after reciting that it was expedient to amend and extend the provisions of the former Act, "as well as to remove certain doubts which have arisen as to the intent and meaning of some of the provisions of the said Act; and whereas by the 2nd sect. of the said Act it is enacted, that, with certain exceptions thereinafter provided, no free grants of public land shall be made to any person or persons whatsoever; and whereas doubts have been entertained whether the same does not preclude Her Majesty from the exercise of her royal grace in the relinquishment of her rights to escheats and forfeitures in favour of those near of kin, or otherwise connected with the parties last seised thereof, and [698] it is expedient to remove all such doubts," it was declared and enacted "that the 2nd section of the said Act extends and shall be deemed to have at all times extended to such lands only as no patent deed had ever issued for, and not to such as having been once granted by letters patent had subsequently become vested in Her Majesty either by act of the party or by operation of law."

We have here a plain definition of the term "public lands" of the Province as understood by the Legislature, a term which has ever since been used and understood in the same sense; and from the preamble to this Act we can gather that the same Legislature which recited as a reason for passing it that it was desirable to remove doubts which had been entertained whether the 2nd sect. of 4 & 5 Vict., c. 100, did not preclude Her Majesty from the exercise of her royal grace in the relinquishment of her rights to escheats and forfeitures in favour of those near of kin or otherwise connected with the parties last seised could never have intended, by the Act of 9 Vict., c. 114, to preclude Her Majesty from the like exercise of her royal grace; this Act, in fact, seems to involve a recognition of the right of Her Majesty to exercise such right in the case of lands become escheated or forfeited in Canada. By the

(1) [The Acts 4 & 5 Vict., c. 100 and 12 Vict., c. 31, were repealed by 16 Vict., c. 159, s. 1. The Act 16 Vict., c. 159, is consolidated in Con. Stat. C., c. 22. The provisions of 12 Vict., c. 31, here referred to, were not re-enacted either in 16 Vict., c. 159, or in the Con. Stat., c. 22.]

6th sect. of 17 & 18 Vict., c. 118, which was an Act passed to empower the Legislature of Canada to alter the constitution of the Legislative Council of that Province, the restraint imposed upon the Legislature of Canada, by the 42nd sect. of 3 & 4 Vict., c. 35, was removed, that section was repealed, and it was enacted, notwithstanding anything in 3 & 4 Vict., c. 35, or in any other Act of Parliament contained, it should be lawful for the Governor to declare that he assents to any bill of the Legislature of Canada or for Her Majesty to assent to any such bill if reserved for the signification of [699] Her Majesty's pleasure thereon, although such bill "shall not have been laid before the said Houses of Parliament; and no Act heretofore passed or to be passed by the Legislature of Canada shall be held invalid or ineffectual by reason of the same not having been laid before the said Houses, or by reason of the Legislative Council and Assembly not having presented to the Governor such address as by the said Act of Parliament is required."

By 28 & 29 Vict., c. 63, s. 2, intituled "An Act to remove doubts as to the validity of Colonial Laws," it was enacted that,—

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

We find then, that immediately preceding the passing of the B. N. A. Act, all Acts of Parliament dealing with this subject, from 1st Wm. 4, dealt with it as forming part of the hereditary casual revenues of the Crown within the colonies which had been surrendered by the Crown provisionally in return for a civil list, in which revenues the Crown retained a reversionary interest, after the times named during which the civil lists contracted for were granted. We find also that the statute of the Legislature of New Brunswick, which had dealt with the subject, specially reserved to the Crown the prerogative right of exercising the royal grace and bounty by making any grant or restitution of any property, real or personal, or the produce thereof to which the Crown should become entitled [700] by escheat for want of heirs or next of kin, or by reason of any forfeiture as 1st Wm. 4 and 1st Vict. had done in England, and the first position taken by Mr. McDougall in his very able

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argument, as I understood it, was, that the effect of that Act, as well as of several of the Imperial Acts above cited, was to maintain inviolate to the Crown the same exercise of the royal grace and bounty in respect of property devolving upon the Crown by escheat and forfeiture in Canada and Nova Scotia; the conclusion drawn being that the power of appropriation of the Legislatures of the old Provinces prior to confederation is to be regarded as affecting only so much, if any, of such revenues as should remain after the full and free exercise by the Crown of its prerogative right of making grant and restitution of all escheated or forfeited property or of the produce thereof (after deducting the expenses attending finding the property of the Crown) to any person having claims upon the person whose estate the escheated or forfeited property was; and that since confederation the exercise of such prerogative right cannot be interfered with by any Provincial authority, or by Provincial legislation. But the question, as it appears to me, is not whether before the passing of the B. N. A. Act, the Crown did or did not retain the royal prerogative right within the Provinces of Canada, Nova Scotia and New Brunswick, but had the several Legislatures of those Provinces power of appropriation over escheated and forfeited property within these respective Provinces—that is to say, in other words, could the Queen, by and with the advice and consent of the Legislative Councils and Houses of Assembly of those respective Provinces, have made any appropriation of those revenues as should seem fit to them, although different from what appropriation had already been made by legislation over such revenues accruing within those Provinces [701] respectively? And I think that in view of the long contention maintained by the Legislative Assembly of Canada upon the subject, which is so empathically asserted in the preamble of the Canada Statute 9 Vict., c. 114, which had been assented to by Her Majesty upon the authority of the Act of the Imperial Parliament specially passed for that purpose, the position asserted in the preamble of the Canada statute must be taken to be admitted by the Imperial Act passed to give it effect, and in view of the provisions of 17 & 18 Vict., c. 118, and in view also of the practice which had become engrafted upon the colonial constitutions with the sanction of the Imperial Parliament, it cannot, I think, now be questioned, that the respective Legislatures of Canada, Nova Scotia and New Brunswick, that is to say, Her Majesty, by and with the advice and consent of the Legislative Councils and Houses of

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Assembly of those respective Provinces, had before the passing of the B. N. A. Act power of appropriation over all the territorial and casual revenues of the Crown accruing within those respective Provinces, whatever may have been contemplated by the equivocal reservation of the very contingent surplus which the Imperial statute, 15 & 16 Vict., c. 39, intended to appropriate to, and make part of the consolidated fund of the United Kingdom.

Now, that the B. N. A. Act places under the absolute sovereign control of the Dominion Parliament all matters of every description not by the Act in precise terms exclusively assigned to the Legislatures of the Provinces, which by the 5th sect. of the Act are carved out of and subordinated to the Dominion, cannot, in my judgment, admit of a doubt. It was admitted by the learned counsel who represented the Provinces in the argument before us, that this was true with respect to all matters of legislation, but [702] it was contended that when the Act deals with "property" the rule was inverted, and that the Provinces take "all property" not by the Act in precise terms given to the Dominion.

The sole foundation for this contention appears to me to be based upon an assumption which in my judgment is altogether erroneous, namely, that the B. N. A. Act transfers as it were the legal estate in the Crown property from the Crown, and vests it in the Dominion and the Provinces respectively as corporations capable of holding property, real and personal, to them, their successors and assigns for ever; but the Act contemplates no such thing; its design as to "properties" as to everything else which is appropriated to the use of the Provinces, and therefore placed under the legislative control of the Provincial Legislatures, is to specify those properties which being still as before vested in the Crown, shall be under the exclusive control of the Provincial Legislatures. And so likewise with respect to the properties assigned for the purposes of the Dominion, control and management over property vested in the Crown for public purposes is what the Act deals with, not with the legal estate in such properties, divesting the Crown thereof and transferring the legal estate in some to the Provinces and in some to the Dominion as corporations, and indeed what we are called to adjudicate upon is a question directly affecting the legislative jurisdiction of the Provinces, namely, is or is not the Act of the Legislature of Ontario, which professes to deal with the property in question, which is admitted to have devolved upon Her Majesty jure coronæ by escheat, ultra vires of the Provincial Legislature?

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Neither can it admit of a doubt, as it appears to me, that the jurisdiction which is expressly given to the Provinces by the 12th item [703] of sect. 92 of the Act over "property and civil rights in the Province," can have no bearing whatever upon the question before us for, 1st, the property with which we have to deal is, unless the B. N. A. Act by clear enactment makes it otherwise, property accruing to Her Majesty jure coronæ, it therefore cannot be taken from the Crown except by express enactment. These words, therefore, "property and civil rights in the Province," cannot affect the property of Her Majesty. We must seek, therefore, in some other clause of the Act for authority to affect this property; and secondly, these words have no effect whatever to restrain the jurisdiction of the Dominion Parliament over property and civil rights in all the Provinces, in so far as any of the matters comprised in the enumeration of subjects in sect. 91 of the Act requires control over "property and civil rights in the Province." Those words therefore must be construed as conferring upon the Provinces jurisdiction only over the residuum of property and civil rights in the Provinces, not absorbed by the jurisdiction over that matter involved in the complete and supreme control over the matters specially placed under the control of the Dominion Parliament. Now, among the items so placed we find "the public debt and property" specially mentioned in the first item of sect. 91, and for payment of the public debt it is to be observed that the consolidated fund of the respective old Provinces of Canada, Nova Scotia and New Brunswick (created by the B. N. A. Act the Dominion of Canada) had been formed, and in this fund and as part thereof, as the "public property" appropriated to meet the public debt, was comprehended, as we have seen, the casual revenues of the Crown accruing within the respective Provinces, in which casual revenues, as we have also seen, was comprised all property real and personal devolving upon [704] Her Majesty jure coronæ within the Provinces, whether propter defectum sanguinis or propter delictum tenentis. Now, of this property so forming part of the revenues constituting the consolidated fund of the old Provinces which was the fund upon which the debts of those Provinces were charged, we find a most plain and unequivocal appropriation made by the 102nd sect. of the Act, namely: "All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective

Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided," and among those charges, in sect. 104, we find "the annual interest of the public debts of the several Provinces of Canada, Nova Scotia and New Brunswick at the Union."

We have here, then, expressed in precise and unambiguous language, appropriation made of everything which formed part of the consolidated funds of the several Provinces before confederation (except what by the Act is particularly and expressly excepted thereout and placed under the control of the Legislatures of the Provinces created thereby) for the formation of the consolidated fund of the Dominion of Canada, in return for the assumption by the Dominion (which the old Provinces were erected into and created) of the public debts of those old Provinces. The question is therefore simply reduced to this: does any other, and if any, what other part of the Act which constitutes the sole charter alike of the Dominion and of the Provinces, except any, and, if [705] any, what part of such consolidated fund of the Dominion of Canada from that fund, and place such excepted part under the control of the Legislatures of the Provinces. It is worthy of note here, in connection with what I have already said in relation to the argument as to the appropriation of property as distinct from "legislative functions," that the excepted part, whatever it be and in whatever clause of the Act it is found, is spoken of as being "reserved to the respective Legislatures of the Provinces," that is, as matter placed under the legislative control of and not as estate vested in the Provinces.

Now, the only clause of the Act which can be contended to involve the exception referred to in the 102nd sect. is the 109th, namely: "All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same."

We cannot, as I have already observed, read these words "lands, mines, minerals and royalties belonging to the several Provinces

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. . . . at the Union," as meaning that the estate and property in those subjects shall be divested out of the Crown and be transferred to and vested in the Provinces as corporations, but, inasmuch as this clause is to be read as expressing the exception out of the consolidated fund referred to [in] the 102nd sect., that these sources of revenue, constituting portions of the territorial and casual revenues of the Crown forming the consolidated fund of the Dominion of Canada, shall be excepted from the general appropriation of all revenues in that fund, and shall be regarded as the excepted parts which are by the 102nd sect. said to be "reserved to the respec-[706] tive Legislatures of the Provinces," and placed under their control.

Now, what lands, mines, minerals and royalties can with propriety, having regard to the manner in which those words have been used in other legislative language above quoted, be said to have belonged to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union? None at all, it is plain, in any other sense than that the revenues arising from such properties belonging to the Crown had been made part of the consolidated funds of the old Provinces now constituting the Dominion of Canada, for the public uses of these Provinces. "Lands" which had been already granted by the Crown, and were at the time of the union vested in the grantees thereof, or in their heirs or assigns, cannot with any degree of propriety be said to have been lands "belonging to the several Provinces . . . . at the Union," and it is only such lands granted which could devolve upon Her Majesty jure coronæ by escheat and forfeiture, and for this reason it was that the Legislature of Canada, which was the chief of the parties to the framing of the B. N. A. Act and to the petition to the Imperial Parliament to pass it, and within the limits of which Province the property now in question is situate, declared by 12 Vict., c. 31, that the term "public lands" in the Province, which is but an equivalent expression to "lands belonging to the Provinces at the Union," did not comprehend lands accruing to the Crown by escheat or forfeiture, and that they did comprehend only the ungranted lands of the Crown in the Province, in which sense they have ever since been understood. (1)

These waste ungranted lands of the Crown, the revenues derived from which constituted part of the consolidated funds of the Pro-

(1) See note on p. 74, *ante*.

vinces before the union were, as we know, appropriated to the public [707] uses of the Provinces; but the lands so appropriated did not constitute all the ungranted lands of the Crown in the Provinces. There were other lands of the Crown, the moneys arising from the sale or other disposition of which did not form part of such consolidated funds; these lands were set apart and appropriated for the actual residence thereon and occupation thereof by certain Indian tribes by whom they were surrendered to and became vested in the Crown, and others were surrendered by the Indians to and vested in the Crown for the purpose of being granted by the Crown and that the moneys arising therefrom should be applied for the benefit of the Indians. These lands are, by item 24 of sect. 91, placed under the control of the Dominion Parliment. The custom in the grants by the Crown of these lands was the same as in the grants of all other Crown lands, namely, to reserve all mines and minerals, but the reservation thereof would accrue, as was provided with respect to the moneys arising from the sale of the lands, to the benefit of the Indians for whose benefit the lands were set apart. Such mines or minerals or the royalties accruing from the disposition thereof could not have been appropriated to the public uses of the Provinces; the "lands" therefore which are referred to in sect. 109 of the B. N. A. Act can only be construed to mean those ungranted, or public lands belonging to the Crown within the several Provinces of Canada, Nova Scotia and New Brunswick, the revenues derived from which before and at the Union, effected by the B. N. A. Act, had been surrendered by the Crown and made part of the consolidated funds of the Provinces; and the words "mines, minerals and royalties" being in the same 109th sect. added to the word "lands," this latter word must there be construed in a limited sense, that is to say, as exclusive of the "mines [708] and minerals" therein, which, if those words had not been added, the word "lands" might have been sufficient to comprehend, but the section reserves for the "Legislatures of the Provinces," not only the mines and minerals, and royalties in or arising out of such lands, but also, "all mines, minerals and royalties belonging to the several Provinces . . . at the Union"; that is to say, not only all mines and minerals in the ungranted lands of the Crown in the several Provinces, the revenues derived from which have been surrendered to and made part of the consolidated funds of the Provinces for the respective uses of the Provinces, but also all mines and minerals in the granted lands, and which by the

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grants had been reserved by the Crown, the revenues derived from which had been also made part of the said consolidated funds: the intention, however, of the 109th sect. was to reserve for the "Legislatures of the Provinces," created by the B. N. A. Act, not only the "lands, mines and minerals" as above described, but also the moneys accruing to the Crown by way of royalties in mines already being worked under leases or licenses from the Crown (which moneys had also been appropriated to and formed part of such consolidated funds), of which there were many in Nova Scotia, to regulate which, as we have seen, Acts had been passed by the Legislature of that Province: the word "royalties," therefore, was added—the whole thus comprising all "lands" being the ungranted lands of the Crown as they were accustomed to be granted, the revenue derived from the sale of which had been made part of the said consolidated funds, and all "mines and minerals," as well those in such lands as also in all lands already granted, the revenues from which mines and minerals had been appropriated in like manner, and "the royalties" derived from such mines and minerals, or (to which may be added) from timber cut upon public lands, [709] under licenses for that purpose, which had also been in like manner appropriated, and all moneys then, that is, at the union, due and payable for any of such lands, mines, minerals and royalties; these words, mines, minerals and royalties, being used all in their natural and ordinary sense, and in the sense in which they were used in the above quoted statutes of the Province of Nova Scotia relating to "mines and minerals." We have thus a plain, simple, rational and natural construction put upon the clause in which these words constituting the exception referred to in sect. 102, are found, and which accords with the provisions of all of the above quoted Acts relating to the same subject, and with the sense in which the same words are used in some of those Acts.

By giving to the words in the 109th sect. their plain, natural and ordinary construction, we need not resort to the construction pressed upon us by the learned counsel for the Provinces, which I must say appears to me to be strained and unnatural, and to have been put forward as expressing what, in the opinion of those learned counsel, should have been the disposition made in the B. N. A. Act by the framers thereof, rather than what has been made, of property accruing to the Crown by escheat or forfeiture. It is with this latter point alone that we have to deal. In view, however, of the disposition attempted to have been made of the property

in question by the Legislature of the Province of Ontario, in derogation of the claims of the woman who had lived for so many years with the deceased as his wife, and of the young man their son who, though illegitimate, had been brought up by the deceased as, and with the expectations of, a son and under the name of the deceased, and in derogation also of the right of Her Majesty to exercise her prerogative of grace and bounty to repair the wrong done to [710] those injured persons, who to all seeming, though not in law, filled the places of wife and son of the deceased (a prerogative which in like cases had never been known to fail), we may be permitted to venture the opinion, that those may be excused who doubt whether the placing the claims of such persons under the control of the Local Legislatures would have been more prudent in any sense, or more calculated to promote the interests of justice and humanity, and to procure redress of the wrongs of the parties already cruelly injured by perhaps the unintentional accident of the deceased having died without a will, or best adapted to advance the real good of the public, than to leave the matter still to be dealt with by Her Majesty, as it had always hitherto been, for the protection of the injured, controlled only by the legislative authority vested in Her Majesty by and with the advice and consent of the Parliament of the Dominion. For the reason, however, already given, I entertain no doubt that control over all property in the several Provinces of the Dominion becoming escheated or forfeited to the Crown is placed under the exclusive control of the Dominion Parliament by the 102nd sect. of the B. N. A. Act, and that no other clause or part of the Act exempts such property from such disposition; the Act therefore of the Province of Ontario, 40 Vict. c. 3, which affects to deal with such property is ultra vires and void, and the appeal in this case should be allowed with costs.

As it did not appear to me to be necessary for the determination of the question before us, I have not followed the learned counsel in all their adverse criticism of the frame of, and of the expressions used in, the B. N. A. Act. I may, however, say that it is not, in my opinion, justly chargeable with the defects imputed to it, or open to the construction put upon it by the learned counsel who [711] represented the Provinces. In my judgment it expresses in sufficiently clear language the plain intent of the framers of that Act to have been, that the plan designed by them of federally uniting the old Provinces of Canada, Nova Scotia and New Brunswick into one Dominion under the Crown of the United Kingdom

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of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom, was, to confer upon the Dominion so formed a quasi national existence—to sow in its constitution the seeds of national power—to give to it a national Parliament constituted after the pattern of the Imperial Parliament, Her Majesty herself constituting one of the branches thereof, and to constitute within that national power so constituted and called the "Dominion of Canada," certain subordinate bodies called Provinces having jurisdiction exclusive though not "sovereign" over matters specially assigned to them of a purely local, municipal and private character, to which Provinces, by reason of this jurisdiction being so limited, were given constitutions of an almost purely democratic character, of whose legislatures Her Majesty does not, as she does of the Dominion, and as she did of the old Provinces, constitute a component part, and to the validity of whose Acts, the Act which constitutes their charter does not even contemplate the assent of Her Majesty as necessary. The jurisdiction conferred on these bodies being purely of a local, municipal, private and domestic character, no such intervention of the sovereign consent was deemed necessary or appropriate, so likewise the power of disallowing Acts of the Provincial Legislatures is no longer, as it was under the old constitution of the Provinces, vested in Her Majesty, but in the Governor-General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by Her Majesty in right of her [712] prerogative royal, but to be exercised no longer as a branch of the prerogative, but as a power by statute vested in the Dominion authorities (the royal prerogative being for that purpose extinguished) and to enable the Dominion authorities to prevent the Legislatures of the Provinces, carved out of and subordinated to the Dominion, from encroaching upon the subjects placed under the control of the national Parliament by assuming to legislate upon those subjects which are not within the jurisdiction of the Provincial Legislatures.

The appeal must be allowed with costs, the order overruling the appellants' demurrer to the information filed by the Attorney-General of the Province of Ontario in the Court of Chancery of that Province discharged, the demurrer allowed, and the said information dismissed with costs.

[*Reported 6 App. Rep. 576.*]

BURTON, J. A. :—

[584] I entertained great doubt upon the argument whether the action of ejectment was not, by the Revised Statutes (1), substituted for the preliminary process which was previously in use, and that if therefore an inquest of office would have been necessary but for the statute, the remedy substituted for it, and that alone, would have to be resorted to.

It is not, in my view of the facts, necessary to consider that question, as I am of opinion, for the reasons so fully stated by my brother Patterson, that no inquest of office would have been necessary in the present case, and that the Crown is not under the necessity of resorting to the statute, but can exercise the right of selecting its forum, and of instituting therefore the proceedings in the Court of Chancery that have given rise to this appeal.

The important question, therefore, for decision is, whether property of this nature, since confederation, goes to the Dominion, or to the Queen for the uses of the Dominion, and not to the Queen for the uses of the Province, for it is too late at this day to contend that the law of escheats pro defectu sanguinis does not exist in this Province. Any such question must now be settled by a Court of ultimate resort.

The learned counsel for the appellant dwelt at great length in his argument on the question of the prerogative of the Crown in matters of escheats, and traced the history of the surrender of the territorial and casual revenues by the Crown to the Province of Canada in aid of a permanent civil list, and the legislation subsequent to that surrender; and contended that these funds having been surrendered and appropriated for a specific object, still remain part of the consolidated fund appropriated for the public service of the Dominion, and that escheats form a portion of these funds. The argument shewed much learning and research on the part of the learned counsel, but, after giving to it full consideration, I humbly conceive that the solution of the matter is to be found in the interpretation to be given to the language of the B. N. A. Act, and that we need not look beyond it.

[585] I find no warrant in that Act for the assertion so frequently made, that all rights or property not expressly given to the Province

(1) R. S. O., c. 94, s. 1.

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pass to the Dominion; on the contrary, I take it to be clear that the Provinces retained all property and rights which were previously vested in them under the Constitutional Acts then in force, except those which by the Confederation Act are taken from them and transferred to the Dominion.

In the distribution of the legislative powers the Parliament of Canada is authorized "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," although the framers of the Imperial Act have endeavoured, by the enumeration of the classes of subjects upon which each should have the power of legislating, to confine each Legislature strictly within the bounds assigned to them; but when we come to the clauses dealing with the property of the Provinces, very different language is used, and very different considerations arise.

In the first place, the Provinces already existed with a constitution of their own, with certain properties, rights, assets, and revenues, and these could only be taken from them by their own consent, or by the legislation of a superior authority. All lands belonging to the several Provinces were, previous to confederation, under our form or system of government, vested in the Sovereign as a mere matter of form, it being a simple trust for the benefit of the Provinces, but were then granted in the Queen's name, by the several Lieutenant-Governors of the Provinces (with the exception of Canada, which was then under the immediate government of the Governor-General), and since confederation in all the Provinces, grants from the Crown of public lands are invariably made by the Lieutenant-Governors in Her Majesty's name.

These lands then, though nominally the property of the Crown, were in truth and in fact the property of the Province, were entirely [586] under the control of the Executive and Legislature of the Province, and although the right of escheat, which is sometimes spoken of as a species of reversion, was in the Crown, it was always exercised for the benefit of the parties beneficially interested in such reversionary interest, or, in other words, the Government of the particular Province in which the land was situated.

This right then, as well as the lands themselves, belonged to the Province, and when we refer to the Imperial Act dealing with these subjects, what do we find?

By sect. 109, all lands belonging to the several Provinces of

Canada, and all sums then due and payable for such lands, shall belong to the several Provinces of Ontario and Quebec in which the same are situate, subject to any interest other than that of the Province in the same.

The term "all lands" must be held to include any interest which the Province then held, or was entitled to, in the lands, including any reversionary interest, or interest incident to the tenure; if not, no disposition whatever is made of such interest, and it will remain in Her Majesty, not impressed with any trust, a result which it would be too absurd to suppose, but yet that would be the result, treating it as a reversionary interest or mere incident to the tenure, for in no portion of the Confederation Act is it given to the Dominion.

The right can be regarded as a prerogative right to this extent and for this purpose only. That it is convenient, under our form of government, that the whole public domain shall be vested in Her Majesty, but purely and solely for the benefit of the Province. The land is under the sole control of the provincial authorities. Her Majesty's name is used by them in every grant from the Crown in the same way as in many other matters, as, for instance, in every writ which, under provincial legislation, issues from the Courts of law, and in the commissions which are issued for the appointment of Justices of the Peace and other provincial officials.

Neither, then as a prerogative of the Sovereign, nor as an incident to the tenure, has the Dominion, in my opinion, made good its claim.

I prefer to place my judgment on the ground I have indicated above, rather than on that adopted by the Court of Appeal in Quebec (1), although I think there is no material difference between them.

I do not think the word revenues, used as it is in sect. 102 in connection with the word duties, can be held to apply to such property as this; but, at all events, territorial revenues cannot be meant, as lands and their proceeds are reserved to the Province by sect. 109, and it would be a forced construction of that section to hold that this reservation did not include lands revested in the Province by reason of the failure of persons to inherit the land granted, or the happening of the contingency upon which it was understood the Province would again acquire a title to them.

(1) See *Attorney-General of Quebec* v. *Attorney-General of the Dominion*, 2 Quebec Law Rep. 236, *post.* p. 100.

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If the claim of the Dominion were once conceded, it must be regarded as controlling the general power of the Province to deal with property and civil rights ; in other words, if, since confederation, property escheated to the Crown pro defectu sanguinis becomes the property of the Dominion, any attempt on the part of the Provincial Legislatures to alter the law of descent, and thus defeat the title of the Dominion to escheated lands, would be ultra vires ; but I regard the fact that this power of dealing with property and civil rights is given to the local Legislatures, without any express limitation, as strongly indicative of the general intention that this description of property was intended still to vest in the Provincial authorities, or, what is the same thing, in the Queen for these authorities.

I am of opinion that the judgment of the learned Vice-Chancellor is correct, and should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J.A.:—

The questions before us arise upon a demurrer by Andrew F. Mercer, one of the defendants, to an information filed by the Attorney-General of Ontario for the purpose of obtaining possession of [588] land in the city of Toronto which was the property of Andrew Mercer, who is now deceased.

The facts with which we have to deal are, therefore, those stated in the information. I shall make a short statement of them.

Andrew Mercer died in June, 1871, intestate, and without leaving any heir or next of kin.

He was, at the time of his death, seised in fee simple of the land.

Immediately after his death the defendants entered into possession of the land without the permission or assent of Her Majesty, and refused to give up possession to Her Majesty, or to the informant acting on her behalf in this Province.

In 1875 the defendant, Andrew F. Mercer, instituted a suit in Chancery against the Attorney-General, in which a decree was pronounced in accordance with the prayer of his bill, referring it to the Master to inquire whether the late Andrew Mercer left any heirs-at-law or next of kin him surviving. Pending that inquiry, an issue was tried at the instance of A. F. Mercer, which resulted in a decree that A. F. Mercer was not the lawful son and heir-at-law or next of kin of Andrew Mercer, and that the defendant, Bridget O'Reilly, the mother of A. F. Mercer, was never married to Andrew Mercer ; and directing the inquiry formerly directed to be proceeded

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with. That was done, and a decree was made, after a hearing on further directions, declaring that Andrew Mercer died intestate and without heirs or next of kin, and that by reason thereof his real and personal estate had become vested in Her Majesty in right of her royal prerogative. These decrees were duly signed and enrolled.

The demurrer was overruled by Vice-Chancellor Proudfoot, and the defendant, Andrew F. Mercer, appeals from that decision.

Four points have been made on his behalf.

First: The application of the law of escheat to lands in this Province is disputed.

[589] Secondly: It is asserted that, if the right exists, it belongs to the Dominion and not to the Province.

Thirdly: It is contended that the Crown can only proceed by the common law process of inquisition of office.

And fourthly: That if inquisition of office has been rendered unnecessary by the Ontario Act of 1877, R. S. O., c. 94, the only substituted remedy is an action of ejectment, and the Court of Chancery has therefore no jurisdiction.

The third and fourth points probably involve the same question, but for the sake of distinctness they may be treated separately.

The first point was not much pressed by counsel; but, in connection with it, reference was made to the old feudal tenures to which escheat was incident, and to the introduction of free and common socage as the tenure upon which the Act of 1791 required grants of land in this Province to be made.

It is not necessary to follow the discussion of these topics, interesting though they may be, because they are really beside the questions with which we are concerned.

We only know that Andrew Mercer was seised in fee simple. We are not informed how or when the land first passed from the crown. Lands in fee are held of some superior lord. "It is a man's demesne, dominicum, or property, since it belongs to him and his heirs for ever; yet this dominicum, property or demesne, is strictly not absolute or allodial, but qualified or feudal; it is his demesne *as of fee;* that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides." (1)

If held in socage, it is sufficient to note from Blackstone (2), that "Escheats are equally incident to tenure in socage, as they

(1) 2 Bl. Com. p. 105.

(2) Vol. 2, p. 89.

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were to tenure by knight service; except only in gavelkind lands, which are . . . subject to no escheats for felony, though they are to escheats for want of heirs."

[590] The argument against the application of the doctrine of escheat to any class of property is incomplete, unless it points out where the title is to vest—who is the ultimus hæres; and this inquiry, being answered in most civilized communities in the one way, is fatal to the argument. I should say that as I apprehended the learned counsel for the appellant, although he took this point, he took it rather as leading up to the other, which I have to notice in its proper place, that if we adopted escheat as an incident to the tenure of our lands, we took with it the necessity of enforcing it according to the ancient procedure, by inquest of office.

In considering the second objection, viz., that which denies the right of the Province as against the Dominion, I have but little to add to what was said by the learned Judges of the Queen's Bench of Quebec, in *Attorney-General of Quebec* v. *Attorney-General of the Dominion (Church* v. *Blake)* (1), in deciding a similar question in favour of the Province. I agree with them in the conclusion at which they arrived, and in the general tenor of the arguments upon which that conclusion is rested. If I have any reservation, it is with reference to one argument which was advanced again before us by counsel for the respondent. I allude to the suggestion that the Local Legislature has power to enact that upon death, intestate and without heirs, the property of the deceased shall vest in illegitimate offspring or pass to some other destination, as to charitable institutions or the like. I have not been able to see that such legislation would be intra vires, if it is granted that, without it, the property would escheat to the Dominion, and particularly if the escheat is properly regarded as a kind of reversionary interest. The argument seems to me to verge upon a petitio principii. It is, however, only employed by way of illustration, and leaves the force of the decision unaffected.

I think there is great force in the contention that the escheat is of the nature of a reversion, and is therefore an interest in land, and is secured to the Province as "land," even without resorting [591] to the term "royalty," by sect. 109 of the B. N. A. Act. I think at the same time that the principle applied by Mr. Justice Ramsay in his judgment in *Church* v. *Blake* (1), to the interpretation

(1) 2 Quebec Law Rep. 236, *post*, p. 100.

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of the word "royalty," is fairly applied, and that we are not compelled by any rule of construction to narrow its ordinary signification. We can scarcely refer to definitions of escheat in the books without finding some allusion to the reversionary character of the right. Thus Bl. Com., Vol. I., p. 302: "Another branch of the King's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the King, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom." And in Vol. 2., p. 72: "The last consequence of tenure in chivalry was escheat; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means. . . In such cases the land escheated or fell back to the lord of the fee." And at p. 244: "The word itself is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee." In Chitty on Prerog., at p. 227, similar language is employed, and he adds: "It is in this point of view that Bracton terms escheat a species of reversion." So Lord Mansfield said in *Burgess* v. *Wheate* (1): "It has been truly said, in the beginning of the feudal tenure this right was a strict reversion. The grant determined by failure of heirs; the land returned as it did upon the expiration of any less temporary interest. 'Twas no fruit, but the extinction of tenure (as Mr. Justice Wright says), 'twas the fee returned." And so the doctrine is uniformly stated in American authorities. [592] I merely add these observations to the discussion of the question in the case of *Church* v. *Blake* (2), and do not attempt an exhaustive or independent examination of it, as I am satisfied to follow that decision.

I now come to the third point, which asserts the necessity for inquest of office.

"The principal rule with respect to offices is, that they are not necessary when the King's title already appears *in any shape* of record:" (Chitty on Prerog. 248).

We must take judicial notice that all lands in this Province are

(1) 1 Wm. Bl. 123, 163. (2) 2 Quebec Law Rep. 236, *post*, p. 100.

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held directly from the Crown, and not under any mesne lord, and that all grants from the Crown are of record. Andrew Mercer, holding in fee simple, therefore held as tenant in capite. The only question which at any time caused me to hesitate as to inquest ever being necessary was what seemed to me the possible necessity for a finding of record that the tenant died without heirs. I do not, however, find anything to countenance a doubt of the kind. On the contrary, it seems to be everywhere broadly laid down that upon the death of the King's tenant, without heirs, no office of entitling is necessary.

In Viner's Abr. Office or Inquisition, D. pl. 10, 11, it is said: "The King may be seised without office. As where the King's tenant dies without heir. *Note.*—It seems that entry by a stranger shall not alter the case."

In *Doe d. Hayne* v. *Redfern* (1) Lord Ellenborough, discussing the return to the inquisition in that case, which had not found of whom the lands were holden, said: "The cases of the King's tenants in capite, and his other known tenants, bear no analogy to this case; because there the tenure was of record, and upon the tenant's death, the King was entitled to take seisin of the land, and to receive the profits to his own use, till the heir appeared to claim the land and receive investiture; and if the heir were under age, the King was entitled to wardship; if of full age, to primer seisin or relief; and if there were no heir, the King's seisin was of course indefeasible.

The circumstance that the defendants are in occupation was urged [593] on behalf of the appellant for two purposes, viz., to shew that there being some one to perform the feudal services, there should be no escheat, and further, as creating a difference between this case and one in which the possession was vacant.

The defendant is in possession, on the facts before us, as a stranger. The allegation in the information is not that he was in possession when Andrew Mercer died, but that he entered immediately after the decease. But, either way, I do not find that his presence there renders office necessary.

The whole objection is, however, covered, conclusively to my mind, by what appears in the information, where we are told that the fact is found of record that Mercer died intestate and without heirs. It has been so found in proceedings instituted by this defendant himself. I do not know that that circumstance

(1) 12 East 96, 110.

makes the matter much stronger, but if any question could have been raised, the remark made by the Master of the Rolls, in *Burgess* v. *Wheate* (1), would be apposite: "But if any one else," he said, "could have made the objection, Burgess cannot, for he brought the Crown here first and so is estopped. In *Sir John Warden's Case*, before Lord Talbot, there was an objection for want of jurisdiction here, and that the matter was properly triable at law. But it being disclosed that he had filed a cross bill, the Court did not enter into that objection, but said the defendant had *given* a jurisdiction." And see *Scripture* v. *Curtis* (2).

I think there is no point of view in which the title of the Crown does not appear of record; and therefore, on the strictest rule, no office was necessary.

Had office been necessary at common law, I have not formed a final opinion as to whether that necessity has been removed by the statute R. S. O., c. 94. The inclination of my opinion has been, that the true construction of that statute merely substitutes ejectment for inquest of office. There are considerations of weight, some of which have been pressed upon us, for refusing to extend by any [594] liberality of construction the necessary effect of that legislation. But, no office being necessary in the circumstances of this case, it is not incumbent on the Crown to resort to that statute at all. The position comes to this: the Crown being entitled to the land, finds an intruder in possession. Whatever remedy, therefore, is appropriate to the recovery of land, the title to which is undisputed, but the possession of which is wrongfully withheld, must be available; and we are merely entertaining, at the instance of the Crown, a suit such as has lately become common in Chancery between subject and subject, and which, apart from the prerogative right to resort to whichever Court the Crown shall choose, is within the ordinary jurisdiction as now established.

My opinion is that this appeal must be dismissed, with costs.

Moss, C. J. O., (3) and MORRISON, J. A., concurred.

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(1) 1 Wm. Bl. 123, 132. (2) 11 U. C. C. P. 345.

(3) [Moss, C. J., had prepared a judgment in this case, which by some means was mislaid.]

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JUDGMENT IN ONTARIO COURT OF CHANCERY.

[*Reported 26 Grant, 126*].

PROUDFOOT, V. C. :—

[127] This is an information by the Attorney-General of Ontario against Bridget O'Reilly, Andrew F. Mercer and Catharine Smith, stating that Andrew Mercer, late of the City of Toronto, died on the thirteenth of June, 1871, intestate and without leaving any heir or next of kin, whereby the real estate of the said Andrew Mercer, in Ontario, became escheated to the Crown for the benefit of that Province. That he died seised of certain specified real estate. That immediately upon his death the defendants entered into possession of it without the permission or assent of Her Majesty, and have continued in possession and refuse to give up the possession to Her Majesty. That possession was demanded on the twenty-first of September, 1878, but the defendants refuse to deliver possession. The defendant, Andrew F. Mercer, demurs for want of equity.

For the demurrer it was argued :

1. That this Court has no jurisdiction in cases of escheat, assuming that cases of escheat per defectum sanguinis are known to our law.

2. That the doctrine of escheat does not apply to lands held in free and common socage. That it is not a doctrine of the common law ; that it is a feudal doctrine and applicable only to feudal tenures.

3. That if the Queen is entitled, the Attorney-General of Ontario is not entitled to represent her, and to appropriate the escheats to the uses of the Province.

4. If escheats exist, this is not the proper mode of procedure to obtain possession.

I shall consider these objections in the order in which they were presented.

The information is practically an ejectment suit, resting upon a legal title, and seeking to obtain possession of the property in question. But this Court has recently held, after much consideration, [128] that the Queen may select any of her courts to assert her rights whether legal or equitable, and this independently of the Administration of Justice Act. It was held also in the same case that, although the Act does not name the Crown, the Crown may take advantage of its provisions. And the Act declares that this Court shall have jurisdiction in all matters which would be

cognizable at law (1). Therefore, even if the Act be ultra vires, still this case is brought in a proper forum.

The tenure of free and common socage is well known to the law —it existed through all the period of the feudal tenures, and was in fact a feudal tenure itself. The Act of Charles 2 abolished the military tenures but did not create the socage tenure; it found it in existence and changed the others into it. The incidents connected with this tenure before that time continued to be attached to it. When the Act of 1791 declared that lands in Canada should be granted in free and common socage, it therefore introduced the tenure with all its incidents and consequences. One of these consequences was the liability to escheat: "All lands and tenements held in socage, whether of the King or of a subject, are liable to escheat." Cruise Dig.: 3. 401. This is inherent in the tenure, an essential part of it, and imposes no restriction upon the owner. He had the power to dispose of it as he pleased during his life, and he might have devised it by his will: when he does neither, and dies without heirs, it is no restriction of his title to say that it shall revert to the Crown.

But it is a mistake, I apprehend, to imagine that the doctrine of escheat to the Crown for want of heirs is only a feudal doctrine. It has a foundation much more ancient, and rests upon principles of general application, independent of any relation to feuds. Blackstone (2) says that in such a case, "to prevent the robust title of [129] occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the Sovereign of the state and those who claim under his authority are the ultimate heirs, and succeed to those inheritances to which no other title can be formed." It was a maxim of the Roman Jurisprudence that the property of those who died intestate, and without legitimate heirs, belonged to the state. "Scire debet gravitas tua, intestatorum res, qui sine legitimo haerede decesserint fisci nostri rationibus vindicandus" (3). And Domat, the celebrated French Jurist, refers it to this principle, that property which has no owner passes naturally to the use of the public and accrues to the Sovereign who is its head, and that in France it passed to the King (4). And I apprehend that similar dispositions will be found in most of the European nations which derived their jurisprudence from the Civil

(1) *Attorney-General* v. *Walker*, 25 Grant, 233.
(2) Vol. 2, p. 11.
(3) Cod. 10, 10, 1.
(4) Dom. Lois Civ. Lib. 4, tit. 8.

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Law. The Code Nap. (s. 559) enacts that the property undisposed of of those who die without heirs belongs to the public domain. And the propriety of some such provision is also evidenced by the enactments of the neighbouring States to the same effect. It is no harsh rule therefore of an obsolete or antiquated state of society, stretching its baneful influence over times and circumstances to which it was never intended to apply; but it is an enlightened provision of the policy of many, if not all, civilized States, to prevent the anarchy and confusion that would arise from permitting the robust title of the strong hand to be asserted.

The sect. 401 of the Lower Canadian code was referred to as shewing that an enactment was necessary to confer this right on the Crown. But that code was not a system of new laws; it was a codification of those that were in force before it was drawn up, and it rather proves the right as a part of previous Provincial law on the subject.

[130] By some strange misconception it was said that gavelkind lands do not escheat, and therefore that lands under our system of inheritance similar to that of gavelkind ought not to escheat. Blackstone (1) is quoted for this; but he is there treating of escheats from corruption of blood from treason or felony, and he says that gavelkind lands are in no case liable to escheat for felony, though they are liable to forfeiture for treason. But even that is too general a statement, for if a tenant in gavelkind, being indicted for felony, absent himself, and is outlawed after proclamation made for him in the county, his heir shall reap no benefit by the custom, but the lands shall escheat to the lord. (Cruise Dig. 3. 401.) There is not a word, however, to establish the assertion that such lands do not escheat for want of heirs.

The expression quoted by the learned counsel for the defendant, from the opinion of the law officers of the Crown in 1817 (2), that all the consequences which follow socage tenure by the law of England must follow it in Upper Canada, seems to me to state the law correctly. If the right of escheat did not necessarily follow the introduction of the tenure by the Imperial Act of 1791, our own statute of 1792, sect. 3, directing that in all matters of controversy relative to property, resort should be had to the laws of England, must be taken to have introduced it. Our own law then has provided for it, and the assertion of the right is not in conflict

(1) Vol. 2, p. 252. (2) Forsyth's Cases and Opinions, p. 154.

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with any local law, but in pursuance of it, and sanctioned by all the weight our approval could give it. It is not an odious prerogative, but a natural and essential right in every well regulated State. The revenue derived from it forms no part of the personal property of the Sovereign, but is received and expended for the benefit of the common weal. It is no confiscation of any one's property, for, from the terms of this bill, it belongs to no one, and [131] the defendants are unjustly in possession of what does not belong to them. There was a great deal said in the opinions of the Judges in *Burgess* v. *Wheate* (1), so largely quoted by the learned counsel, that renders it difficult to determine (as Lord Thurlow said in *Middleton* v. *Spicer* (2),) whether that case was such an one as bound only when it occurred speciatim, or afforded a general principle. It "was determined upon divided opinions, and opinions which continue to be divided, of very learned men." All that was really decided in the case was that a trustee having the legal estate held it for his own benefit when the beneficiary died without heirs. There was a tenant (who had the legal estate) to perform the services, and the land could not revert.

The next question discussed was, if the Crown was entitled, is the Attorney-General of Ontario authorized to represent Her Majesty, and to appropriate the escheat for the purposes of the Province. The learned counsel made an able argument to shew that escheats belong to the Consolidated Revenue of the Dominion and not to the Local Legislature. That so far as there is any power in Canada of appropriating these revenues under Imperial Acts, the Federal Parliament alone can deal with them. That the casual revenues of the Crown in Ontario (as distinct from territorial) are Federal revenues applicable to Federal purposes, and payable to the Receiver-General of the Dominion. The question has been the subject of judicial decision in the Queen's Bench in Quebec, on appeal from the Superior Court at Kamouraska, in a case in which the Attorney-General for Quebec was the appellant and the Attorney-General for the Dominion was respondent (3), and it was determined that the escheat accrued to the benefit of the Province of Quebec, and not of the Dominion. While not absolutely bound to follow that decision, yet considering that it was the unanimous decision of [132] judges of great eminence of one of the Confederate Provinces,

(1) 1 Wm. Bl. 123; 1 Eden, 127. (2) 1 Brown C. C. 201, 204.

(3) *Attorney-General of Quebec* v. *Attorney-General of the Dominion*, 2 Quebec Law Rep. 236, *post*, p. 100.

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sitting in appeal, and construing the same Acts and legislative provisions now brought into question, it would be unseemly in me to venture to give a contrary opinion, and I have therefore concluded to follow that decision until it be reversed by some higher tribunal, without endeavouring to construe the various Acts that were referred to.

The last ground of demurrer argued was that the mode of procedure was essentially wrong, by a misconception of a statement in some of the law books, that while there was a tenant there could be no escheat, and that here the defendants were tenants in possession. *Tenant*, however, in this case means one who holds by tenure. The case usually put to exemplify it is Litt. s. 390. "If there be lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enter as in his escheat: in this case the disseisee may enter upon the land, because the lord cometh not to the land by descent but by way of escheat:" or, in other words, when the tenant in fee has been evicted by an intruder who sells, and the purchaser dies without heirs, the land does not escheat, because there is a rightful owner, a tenant, in existence, who is entitled to enter and repossess himself of his estate; *i. e.*, the death of a person in possession without title and without heirs does not enable the lord to take it as an escheat to the prejudice of him who has the title. The case quoted from 4 Rep. 54 b, *The Commonalty of Sadlers*, is to the same effect. In *Sir George Sands' Case* (1), the legal estate was in Sir George Sands, subject to a trust, and the beneficiary was executed for murder, and it was held there was no escheat, for there was a tenant, *i.e.*, Sir George Sands, who had the fee simple in him. The same was the decision in *Burgess* v. *Wheate* (2), where it was held that where the [133] beneficiary died without heirs, the trustee might hold the estate. He had the legal fee in him, he was a tenant in the proper sense of the word, and there could be no escheat. *Doe d. Hayne* v. *Redfern* (3), proceeded upon the fact that office had not been found, and therefore the title of the plaintiff was not perfect. The cases quoted shew nothing more than this, that if the legal estate be vested in some one, the death of the person beneficially entitled will not cause an escheat. The case of mortgagor and mortgagee proceeds on the same principle. The legal estate is in the mortgagee, and upon the death of the mortgagor without heirs there is

(1) Hardres, 488. (2) 1 Wm. Bl. 123; 1 Eden, 127. (3) 12 East, 96.

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no escheat, for there is a tenant, the person having the estate. It was said that the son here was as much a tenant as the heir of a disseisor. Suppose that to be the case, the heir of the disseisor is not the tenant who prevents the escheat, but the disseisee.

If the view contended for by the defendant be law, the first occupant, any squatter who might chance to get into possession, would be entitled to hold possession. But there is said by Blackstone (1) to be only one instance wherein a title to real estate could ever be acquired by occupancy, viz., on the death of a grantee for the life of another, and even that has been altered since his time (2).

But a mere possessor without title is not a tenant. He may be an occupant, but the cases cited do not refer to such a person.

Following the decision in Quebec, I must also assume that the R. S. O., c. 94, on this subject is not ultra vires, and that the A. J. Act, so far as applicable to the mode of procedure, is also not ultra vires. By the Escheat Act, R.S.O., c. 94, the Attorney-General may bring ejectment, and the proceedings may be similar to those in other actions of ejectment. Grants may be made of escheated lands without in- [134] quest of office being first found, and the grantee may take proceedings in any Court of competent jurisdiction for the recovery of them. By the A. J. Act, this Court has all the power of a Court of law in such actions. It would be strange, therefore, if the grantee of the Crown would be in a better position than the Crown itself, and might bring a suit here which the Crown could not. But that would be reversing the order of affairs, as the Crown has the option of a forum where a subject has not. There is no peculiarity in the case which would require the intervention of a jury, supposed to be the especial guardian of popular rights, and a protection against the encroachments of power. There is nothing of the kind to dread. The Crown has to establish the fact of the owner's death without heirs. When that is done the assertion of the right is not an injury to any one having a lawful right, for there is no such person, and no prejudice is done to the people, for it is in their interest the right is asserted.

The Act of Henry 6 was principally aimed at escheats from other causes than want of heirs. At that time the military tenures were in full force, and the grounds upon which escheats were incurred were numerous (3). Refusal to attend Superior Court, denial of

(1) Vol. 2, p. 258. (2) 1 Vict. c. 26, s. 6; 1 Wms. on Exors. 648, ed. 1867.
(3) See Hottoman, *de feud. disp.*, c. 38, and his Lib. Feud. throughout; Hume's Hist. I., 462, 463.

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tenure, selling without license, etc., etc., and in such cases great scope was given for oppression by the escheators. None such now exist, and even the theoretical principle upon which the Act was based has ceased to operate. But I need not inquire into that now, as the Ontario Act, which I assume to be effective, has substituted another mode of procedure.

I think the demurrer must be overruled with costs.

JUDGMENTS OF THE QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE—IN ATTORNEY-GENERAL OF QUEBEC v. ATTORNEY-GENERAL OF THE DOMINION OF CANADA (CHURCH v. BLAKE).

[*Reported 2 Quebec Law Rep. 236.*]

DORION, C. J.:—

Edward Fraser died at Fraserville, in the Province of Quebec, on the 2nd day of February, 1874. He was not married; he left no heirs and no will. Under Article 637 of the Civil Code his estate devolved to the Crown. However, shortly after his death, one Damase Caron was appointed curator to his vacant estate, under Article 347 of the Code, and took possession of the property. The Attorney-General for the Province of Quebec then instituted this action to recover from this curator the property composing the estate.

After the return of the action the Attorney-General for the Dominion, acting also on behalf of Her Majesty, petitioned to be permitted to intervene in the cause to claim the estate. This petition being contested by the plaintiff, the parties were heard, and by the judgment of the court below, the Attorney-General for the Dominion was declared to be entitled to claim the estate and was allowed to intervene.

The present appeal is from this judgment, and raises the important question, whether escheats belong to the Dominion or to the Province wherein they arise; for although both parties claim [237] the Fraser estate on behalf of Her Majesty, they in reality do so on behalf and in the interest of their respective governments. In both instances they use the name of Her Majesty, but only as representing the public domain, that of the Dominion in one case and that of the Province of Quebec in the other. The contestation being thus submitted by the parties, it is unnecessary to inquire whether they

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are both right in assuming to proceed as they have done on behalf of Her Majesty, and the only question which by the pleadings is submitted to us is, whether the Attorney-General for the Dominion has shewn any right to this estate, for if he has no right to it he has no right to intervene in the cause. The title of the Attorney-General for the Province of Quebec is not now in question.

It is unnecessary for the purpose of this case to inquire into the origin of this right to escheats. It is sufficient that at the time the B. N. A. Act, 1867, was passed, they belonged to the Crown, as declared by our Code, or more properly to the government of the late Province of Canada, in whose favour Her Majesty had released that portion of her revenue arising in the Province, in consideration of the Civil List granted to Her Majesty by the Act 9th Vict., c. 114.

The right of the late Province of Canada to these escheats being undoubted it only remains to ascertain whether it was reserved by the Confederation Act to the Provinces of Quebec and Ontario, or attributed to the Dominion Government.

In the distribution of powers made by the Confederation Act between the Dominion and the separate Provinces, the Dominion Parliament has the control of all matters of a general character affecting the whole Dominion. The Provincial Legislatures exercise their authority over matters affecting the inhabitants of their respective Provinces only, and among the subjects to which their authority extends is the power of legislation as to rights of property and civil rights in general (B. N. A. Act, s. 92, sub-s. 13).

The right to regulate the transmission of property by inheritance falls within the powers of the Legislatures of the several Provinces, as affecting rights of property and civil rights. For instance, the Provincial Legislatures may restrict or extend the degrees of relationship beyond which parties will cease to inherit ; they may, as is the case in France, decree that in default of legitimate heirs the estate of the deceased shall descend to his illegitimate offspring, [238] or they may order that it shall revert to some educational or charitable institution, and by their legislation they may materially affect or destroy altogether the right to escheats.

Under sect. 102 of the Confederation Act, all the rights and revenues which the Legislatures of the several Provinces had a right to appropriate (except such as are by the Act reserved for the respective Provinces, or which are received under the special powers conferred upon them by the Act) form part of the consolidated revenue of Canada ; and by sect. 126, all the rights and revenues reserved to

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the Governments or Legislatures of the several Provinces, and all the rights and revenues received by them under the special powers conferred upon them form part of the consolidated revenue fund of each Province. The property derived from the exercise of the right of escheat constituted a revenue which, before confederation, the several Provinces had a right to appropriate. It would therefore belong to the Dominion Government unless specially reserved to the Provinces, or unless it came within the category of those rights which are received in virtue of the special powers conferred by the Act upon the several Provinces. The only other sections of the Act having reference to the distribution of the assets of the several Provinces are sects. 107, 108, 109, 113 and 117, together with schedules 3 and 4 annexed to the Act. In none of these do I find that the right to escheats is specially reserved to the Provinces, but from what I have already said, escheats seem to come within that class of revenues which are derived from the exercise of the powers specially conferred on the Provincial Legislatures. If these Legislatures have the power to enlarge or curtail the extent of this right by extending or restricting the range of parties to whom the estate of deceased persons may be transmitted, or if they can abolish it altogether, then the existence of this right to escheats is subject to the authority of the Provincial Legislatures, and the revenue derived from it is collected in virtue of the powers specially conferred on them by the Act, since it depends upon their action whether this source of revenue shall be maintained, and to what extent, or whether it shall be abolished altogether. There is here no question of prerogative or of sovereignty, but a mere question of interpretation of the B. N. A. Act, 1867.

The Court is unanimous in saying that the Dominion Govern- [239] ment has no claim to the estate in dispute, and that the petition of the Hon. Edward Blake, as Attorney-General for the Dominion, should have been dismissed. The judgment of the Court below is therefore reversed.

[*Translated*]

TESSIER, J.—

This is a question of escheat. To whom does the property revert of one who has died without heirs, in the Province of Quebec, where he was domiciled, where he died, and where the property is situated? Is it to the Government of the Province of Quebec or to the Government of the Dominion of Canada?

In order to apply the laws of escheat, it is well to go back to their

origin. These laws form part of the civil law, and escheat is only a mode of succession, prescribed for the case of those who leave no heirs, or which amounts to the same thing, such heirs only as disclaim the inheritance; in such cases, to follow the language of Article 637 of our Civil Code, "the inheritance goes to the Crown," or to use the words of Article 401, "such goods belong to the public domain."

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It is plain that in our code, and also in our judicial language, there is sometimes a strange abuse of the words the Sovereign, the public domain, the Crown, Her Majesty the Queen, the domain of the State, as if these words were synonymous. This, however, is not the case; and very often the name of Her Majesty is used in widely different senses.

The right of escheat was and is nothing more than a right of reversion, so that property may return to the authority by whom it was first granted out of the public domain. This authority, it is allowed, is primarily represented by the Sovereign; but has the Sovereign, with the sanction of the Imperial Parliament, conferred this right on others? It is admitted that rights of escheat belonged to Canada before confederation; so that Her Majesty the Queen and the Imperial Parliament had already surrendered these rights to the colony; and the only question is, to which of the two Governments, Federal or Provincial, belongs the revenue accruing from this right of escheat?—a question which must be decided by the construction of the B. N. A. Act.

Sect. 102 says: "All duties and revenues over which the [240] respective Legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada."

Now in the foregoing clause we have an exception, and is not the revenue derived from escheat among those included in that exception, viz, among "such portions thereof as are reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act?" It seems to me that this exception is thoroughly supported by sects. 92, 109 and 117. Sect. 92 is headed, "Exclusive Powers of Provincial Legislatures," and among these exclusive powers it is enacted,

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that in each Province the Legislature may exclusively make laws in relation to "Property and Civil Rights in the Province" (sub-sect. 13), and "The administration of justice in the province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction" (sub-sect. 14). The law of escheat is only a rule of civil law; and the Legislature of Quebec has exclusive power to make laws in regard to the degree and mode of succession, so that there would be nothing to prevent it from passing an Act to extend the right of succession to illegitimate children or relatives, or even to such institutions as may undertake the bringing up of illegitimate children.

This law of escheat has been handed down to us by Article 167 of the Coutume de Paris, which reads as follows: "When the owner and occupier of an estate departs this life without heirs, the High Justiciary within whose jurisdiction the estate is situated can lawfully enter and hold such vacant and unoccupied estates."

If this right of escheat is considered an incident of the right of the supreme administration of justice (de la haute justice), sect. 92 has given exclusively the administration of justice to the Provinces, and the revenue accruing from this right of escheat would go with it.

If, on the other hand, the right of escheat is considered to be an incident of territorial revenue, sects. 109 and 117 give both in detail and generally the powers of the Provincial Legislatures over the public lands and over all the accessory and incidental rev- [241] enues derived therefrom.

Sect. 109 says, "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces," &c.

And sect. 117, stating this power generally, adds, "The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

This division of powers has an application to various other subjects. For instance, goods confiscated by force of the customs laws belong to the Crown, to the Sovereign, that is to say, to the Federal Government, which has the control of the subject; but unclaimed stolen goods, sold by order of the Court, belong likewise to the Crown or to the Sovereign, that is to say, to the Local

Government, and the proceeds of such sales are not returned to the Federal exchequer. Lands gained from the sea by accretion or islands arising in waters within the boundaries of the Provinces also belong to the separate Provinces.

It is vain, therefore, to argue on the ground that it is the Governor-General and not the Lieutenant-Governor who is the Queen's representative. This is true in regard to the special attributes of royalty which Her Majesty can delegate and confer by and in virtue of her royal prerogative and instructions; but it is not true in regard to those matters over which Her Majesty the Queen has no longer any direct power, such as the public lands and the rights of property, and civil rights in each Province. The name of Her Majesty can be used in the administration of justice and to enforce the rights of property of the Provincial government, because this is a part of the sovereign authority conferred on the Provincial governments, and which they have the right to exercise in the name of Her Majesty. If the Provincial government, or its officers, or the courts, were seen to drop the name of Her Majesty even in civil actions brought by the Local government, exception might be taken to this course, which, though perhaps more correct in fact, might be held to imply an independence which does not belong [242] to our Provincial governments any more than to the Federal government.

It is said that the Lieutenant-Governor does not represent Her Majesty in the same way as does the Governor-General. This is true in a general sense, but not in regard to the special attributes given to the Lieutenant-Governor by the Imperial Act. In these he is as truly the representative of the Sovereign as is the Governor-General in those which belong to him; otherwise Legislative Councillors would be persons of more importance and nearer royalty than the Lieutenant-Governor, because sect. 72 says they shall "be appointed by the Lieutenant-Governor, in the Queen's name," and those so appointed would find themselves above the power which in reality selects them. This would be a curious anomaly.

In the preamble of the Act of confederation it is declared, that the Provinces have expressed their desire to be federally united. This supposes a federation of powers, a division of the powers among the different Provinces, and a reservation of certain rights to each Province of the confederation, in contrast with a legislative union in which all powers are concentrated in one Legislature

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or Parliament. It is in virtue of this treaty of confederation that each Province has preserved its particular rights, amongst which are to be found the exclusive right to the public domain and the domain of the State in each Province; and among the incidents of the public domain is to be found the right of escheat, which is subject to the judicial, legislative and executive control of the Province of Quebec. I am therefore of opinion that in the present instance, the property belonging to the vacant succession of the late Edward Fraser, Esquire, whether real or personal, situated in the Province of Quebec, belongs to that Province, which is represented in this case by the Attorney-General of the Province, or in other words, to use a description more dignified though not more correct, by Her Majesty's Attorney-General for the Province of Quebec.

RAMSAY, J.

If the technical question insisted on at the argument were the only one in the case, it could scarcely give rise to any difficulty. In defining the executive power the B. N. A. Act, sect. 9, declares it to vest in the Queen; and when we come to the legislative power in sect. 58, it is declared to be vested in the Queen, the Senate and the House of Commons. On the other hand, the executive power of the Provinces is declared to be vested in an officer [243] called the Lieutenant-Governor, who is appointed by the Governor-General (sect. 69), and the legislative power of the Province of Quebec is declared to be vested in the Lieutenant-Governor, the Legislative Council and the House of Assembly. This distinction is kept up and the officers of the Provinces are so designated (sects. 63 and 134).

Then as to the word "Crown," used in the Code, its interpretation can give rise to no difficulty. The Crown means the Sovereign, in whom individually is vested all the property of the Crown. Of course, for the purposes of administration, as the government became more fully organized, the revenues of the Crown had to be appropriated in different ways, and so we have the Privy Purse and the Civil List. In like manner we have the separate purses of the different colonies; and when we hear of the colonies claiming the escheats as part of their revenue, they are only claiming that such portion of the revenue legally vested in the Sovereign shall be applied to colonial purposes.

The question we have therefore to decide is, to which of the two

governments have the Queen, Lords and Commons given escheats? This question involves the examination of sects. 102, 109 and 117 of the B. N. A. Act. This Act gives rise to a difficulty of construction, which perhaps I may exaggerate but which is worthy of consideration, and that is the double enumeration which constantly occurs. It is to be found prominently in sects. 91 and 92. Its inconvenience there did not escape the observation of the framers of the bill, for they have terminated sect. 91 by a saving clause of great importance, which makes sect. 92 subordinate to sect. 91. In the sections we have now to consider we have again the double enumeration, but without the saving clause in favour of either enumeration. This sect. 102 gives to the Dominion "all duties and revenues," "except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces," while sect. 117 gives to the several Provinces "all their respective public property not otherwise disposed of in this Act." What is included in "revenues?" What is designated by "public property?" Is the Dominion to have all the revenues, and are the Provinces to own only the naked [244] property? I see no mode of reconciling these two sections but by referring to sect. 109. There we find that by property is intended "lands, mines, minerals and royalties." Now, what are "Royalties?" In the largest sense of the word they are all royal prerogatives. It is evident that the word is not used in that sense, and it must be limited. But how far? It would be manifestly indefensible to limit it to the royalties arising from mines of gold and silver, and therefore it would seem fair to make it extend to all those minor prerogatives of the Crown which formed part of the property of the Crown. This interpretation is open to objection; but it is obvious that the text of sects. 102 and 117 cannot both be maintained in their integrity; and as they are both general sections, and there is no saving clause, the interpretation should prevail which is most in accordance with the other sections of the Act. I think, therefore, that the appeal must be maintained, and the intervention of the Minister of Justice be rejected.

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Ramsay, J.

SANBORN, J.:—

This case involves a question between the government of the Province of Quebec and the government of the Dominion of Canada. Edward Fraser died at Fraserville, in the Province of Quebec, on the 2nd day of February, 1874, unmarried, and without heirs, and intestate. Under Art. 637, C. C., his succession falls to the Crown.

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This is one of the minor prerogatives of the Crown, which in colonies having representative Legislatures b comes subject to local legislation (Chitty on Prerogatives, p. 27).

The Sovereign's individual prerogative is subordinated to his power as exercised in Parliament.

This estate would undoubtedly have fallen into the consolidated revenue had it become open before the federation of the Provinces (see Con. Stat. Can., c. 10, s. 5 ; also c. 16, s. 1). The question here is, does it belong to the Province of Quebec or the Dominion of Canada ?

The first thing to be noticed is that this minor prerogative came under the control of the late Province of Canada, by virtue of the power conferred on that Province over the subject of property and civil rights within the Province. The personal prerogative of the Sovereign was yielded up to the Province, when the royal assent was given to the Act 9 Vict., c. 114, which declares that a Civil List is accepted by Her Majesty instead of all territorial and other revenues at the disposal of the Crown, arising in the [245] Province. The salary of the Governor-General and the salaries of the Judges which comprised that Civil List have always been paid by the colonial governments, and the royal prerogatives thus yielded to the Province have never been withdrawn.

Under the 92nd sect., 13th sub-sect. of the B. N. A. Act, 1867, the power to legislate over the subject of property and civil rights within each Province was given to the Legislature of the Province. Under sect. 102 of said Act, it is provided that "all duties and revenues, over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union, had and have power of appropriation; except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada," etc. Escheats, of the nature of the one in question, are subject to the control of the Provincial Legislatures. It is competent for the Parliament of Quebec to establish the law relating to descents, and it may amend, modify or repeal, the article 637 of the Civil Code. It may be said that there is a limit to this power of Provincial legislation over property; that it cannot enact that property which, by the Imperial Act, is given to the Dominion, shall belong to the Province. This is true, but the public property given to the Dominion is given in

express terms (sect. 108), and specified in the 3rd schedule appended to the Act, such as canals, harbours, etc. Over such property the Provincial Legislature has no power to legislate, but as having the power to legislate concerning property, that is, private property and civil rights, within the Province. The right to determine to whom the property of a person dying intestate without heirs shall go is of the same nature as the law of descent, in fact it is a part of the law of descent which, I presume, no one doubts pertains to the jurisdiction of the Provincial Legislatures. Escheats pro defectu sanguinis only go to the Crown with the same title as the person leaving them had. 4 Kent's Com. 427; *Re Capt. Gordon*, Foster's Crown Law, p. 95. This proves that the law governing descents governs this subject. By sect. 109 of the same Act, it is declared that "all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, and all sums then due or payable for such lands, [246] mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise." This covers all reversions as well as existing lands, mines, minerals and royalties. Escheats of the nature of the one in question are royalties. See Brown's Law Dictionary, p. 317, where he defines royalties to be rights and prerogatives of the King (1 Blackstone, 241).

In the case of *Dyke* v. *Walford*, decided in the Privy Council (1), it was held that jura regalia include personal effects of a bastard dying intestate, and go to the King. It may be said that the word royalties in this section is used in a more restricted sense, and by it are intended rents or dues payable for the right of mining for the precious metals. I see no restriction in it, particularly as the same reason that would give a class of royal perquisites to the Province where they arise would give all, and it is more reasonable to interpret the word in its primary than in its secondary and limited sense, which is rather a meaning given to these royal rents by miners, than the true sense of the word.

In connection with the reasoning before adopted sect. 117 has force which says: "The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the

(1) 5 Moore P. C. 434.

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country." This in connection with sect. 108 and schedule 3, shews what sort of public property is given to the Dominion and for what purposes.

For these reasons the Court considers that the estate of Fraser, if subject to escheat, falls to the Province of Quebec. There is every reason why it should be so; these escheats are of feudal origin, and the land reverted to the feudal lord or to the Crown; and, as Broom in his Legal Maxims, p. 317, expresses it, "This is in accordance with the spirit of the ancient feudal doctrine expressed in the maxim, Quod nullius est, est domini regis." All power which might at any time have existed in the seignior or sovereign over lands or reversions of lands is now vested in the Province where they are situated. This points to the reversion in case of lands. As respects moveables it is reasonable that the same result should be. It harmonizes with the purposes and objects of the law as [247] indicated by the Act creating the two jurisdictions. The general powers and revenues and public property of the Dominion bear much the same relation to those of the Provinces that the United States bear to the several States, and it has never been pretended that escheats pro defectu sanguinis became the property of the United States. The reversion, as well in personal as real estate, has been always given to the State within which the escheat arises. This is assumed as law in the case of *Cross* v. *De-Valle* in the Supreme Court of the United States (1). It will be seen that the same reasoning has led to this conclusion as has been adopted in this case. Cooley on Constitutional Limitations, p. 525, speaking of eminent domain, says: "Under the peculiar American system, the protection and regulation of private rights, privileges and immunities in general, properly pertain to the State governments, and those governments are expected to make provision for those conveniences and necessities which are usually provided for their citizens through the exercise of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation, and such has been the conclusion of the authorities."

The Court determines this question as one between the Province and the Dominion, although it is somewhat curiously presented, one Attorney-General claiming on behalf of the Queen against another Attorney-General claiming on behalf of the Queen. We

(1) 1 Wallace 1.

must understand this as a claim for the respective governments, and we must understand by the Queen what Art. 637 of the Code means by the Crown, not the Queen or the Crown, but one or other of the governments, which we decide to be that of the Province.

In doing this, we do not determine and do not find it necessary to determine which government has the right to act for the Queen, or whether both have. It is a question as to distribution of rights and privileges by the B. N. A. Act of 1867, and from careful study of that Act, we think this minor prerogative belongs to the Province where it arises. Hence the intervention of the Attorney-General of the Dominion of Canada must be dismissed.

[*The formal judgment is as follows.*]

The Court of our Lady the Queen, now here, having heard the appellant and respondent, by their counsel respectively, examined as well the record and proceedings had in the Court below, as the [248] reasons of appeal filed by the appellant and the answer thereto, and mature deliberations on the whole being had, considering that by the admissions of the parties to the issue raised upon the intervention filed by the honourable Attorney-General for the Dominion of Canada, acting in this behalf for Her Majesty the Queen, it appears that the late Edward Fraser, whose estate is claimed by the Honourable Attorney-General for the Province of Quebec, acting also in this behalf for Her Majesty the Queen, died at Rivière du Loup, in the Province of Quebec, about the second day of February, 1874, without heirs and intestate, and according to the pretensions of both parties, he left an estate which hath escheated to the Crown;

And considering this is one of the sources of revenue which, as a minor prerogative of the Crown, was yielded up to the respective Provinces now confederated into the Dominion of Canada, prior to the union of the Provinces of Canada, Nova Scotia and New Brunswick, and that such escheats prior to said union formed part of the revenues of the respective Provinces where they arose;

And considering that by the B. N. A. Act of 1867, such revenues as were subject to the appropriation of the respective Legislatures of Canada, Nova Scotia and New Brunswick, and which are raised by the several Provinces since the union, in accordance with the special powers conferred upon them by that Act, belong to said Provinces;

And considering that as having jurisdiction over the law of descents by virtue of its jurisdiction over property and civil rights in the Pro-

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vince under said Act, the Legislature of the Province of Quebec is invested with power to appropriate this casual revenue to itself;

And considering that amongst other things, it is declared by the said B. N. A. Act, of 1867, that all royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, and that escheats, such as the one in question, are royalties;

And considering that said estate is composed of real as well as personal property, and that all territorial Crown rights and privileges possessed by the late Provinces of Canada, Nova Scotia and [249] New Brunswick, before the union thereof into the Dominion of Canada, have been, at the union, given to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, and the law of escheat, by reason of want of heirs, is of feudal origin, and cognate with the law of tenures;

And considering that by the general tenor of the Act of Union, and the division of assets and revenues, it is manifest that a casual local revenue, like the one in question, was intended to be left to the local Province;

And therefore, considering that there is error in the judgment rendered in this cause, in the Superior Court, at Kamouraska, on the twenty-ninth day of January, 1876, and now in appeal, in maintaining the intervention of the honourable Attorney-General for the Dominion of Canada, claiming said estate of the said late Edward Fraser, as belonging to the Dominion of Canada and not the Province of Quebec, doth reverse the said judgment, and proceeding to render the judgment which the Court below ought to have rendered, doth maintain the appeal of the Attorney-General for the Province of Quebec, in this cause, and doth reject the petition of intervention of said Attorney-General for the Dominion of Canada.

JUDGMENT IN SUPERIOR COURT.

[*Reported 1 Quebec Law Rep., 177.*]

[*Translated.*]

TASCHEREAU, J.:—

The question for decision in the present case is: Do rights of escheat, for want of heirs and the revenues arising therefrom, belong under our Constitution to the Federal Government or to the Provincial Governments?

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It is plain that the decision which I have to give on this point is little more than a matter of form, and that a final decision to be binding throughout the Dominion, must come from the Supreme Court or the Privy Council. However, I must treat this question and decide it as any other question raised before me.

Though I may regret that the two governments who are parties to this litigation have not thought themselves able to depart from the usual course, but have come to a Court of the first instance, yet I certainly cannot complain of the labour which the case has required ; three pages of writing make up the record, and the decision of the question seems to me easy. When the deceased leaves no relatives within the degrees of succession, his property belongs to the surviving husband or wife, and in default of such survivor the succession est acquise au souverain. The succession falls to the Crown, the English version says. Such is our law as contained in articles 636 and 637 of the Civil Code.

Such was the law of old France on the point, such is also the law in England where, moreover, escheats propter defectum sanguinis, being to the Crown.

It seems to me then useless to enquire if this part of the law of England as to the rights of the Crown, was imposed on us by the conquest (see contra *Attorney-Gen.* v. *Black* (1), as to minor prerogatives).

It seems to me also unnecessary to refer to the feudal law, [180] and to speak of the lord of the manor, or the lords high justiciaries and their rights to escheated estates.

For us the lord of the manor, the high justiciary, is the Sovereign ; and to the Sovereign alone do these successions belong. In what right do these successions belong to the Crown ? what is the nature of these rights of escheat from failure of lawful issue ? the answer seems to me easy. These rights are appanages of the Crown, attributes of sovereignty, forming part of the Sovereign's prerogatives. In England as in France these are minor prerogatives, minora regalia. But for the purposes of the present question, there is no difference between these and the major prerogatives, majora regalia (Domat dr. civ. des successions, liv. I. tit. 1. sec. 13 ; Domat. dr. public, liv. I. tit. 6, sec. 3 ; Ferriere dict. v. regals. roy ; Merlin, Rep. v. bâtard ; Ancien Denisart, v. déshèrence, régales ; Lebret de la Souveraineté liv. 3, ch. 12 ; Bacquet, dr. de Bâtardise p. 120 ; Bacquet, dr. de

(1) Stuart's Rep. p. 324.

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déshérence, p. 156 ; 1 Blackstone, book 1, ch. 7 and 8 ; 2 Blackstone, book 2, ch. 15 ; 2 Stephen's Comment, 528, 550 ; Chalmer's Colonial Opinions, p. 142 ; Chitty on Prerogatives ; Wharton's Law Lexicon v. escheat ; Bacon's Abridg. v. prerogative, pp. 486, 495, 580 ; *Attorney-General* v. *Köhler* (1) ; *Weymouth* v. *Nugent* (2) ; *In re Bateman's Trust* (3).

I have said these rights belong to the Sovereign. Now, under our constitution, the sovereignty is at Ottawa. It is only there that Her Majesty is directly represented. It is only in relation to the Dominion that the 9th sect. of the B. N. A. Act says : "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen." And when it is a question of the legislative power, it is of the Federal Parliament only, and in no sense of the Provincial Legislature, that the Queen forms a part. "There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons," says sect. 17 of the Act. This is in reference to the Federal Parliament. Now, are the Provincial Legislatures composed of the Queen and one or two Houses ? By no means. "There shall be a Legislature for Ontario, consisting of the *Lieutenant-Governor* and of one House"; sect. 69. "There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of two Houses "; sect. 71.

For the Parliament of the Dominion, the *Queen* and two Houses ; for the Legislature of Quebec, the *Lieutenant-Governor* and two Houses.

The Lieutenant-Governors in each Province sometimes act for [181] and in the name of Her Majesty, in those *exceptional* cases where the power is given by the B. N. A. Act. But the Governor-General alone is the direct representative of Her Majesty in and for the whole Dominion, and to him alone, as such representative, is entrusted the exercise of the royal prerogatives, within the limits fixed by the constitution (and this constitution *for the Dominion* is partly written and partly unwritten), either resulting from our dependence on England, or still further prescribed by the special instructions which Her Majesty is pleased to give him. There is only one sovereignty for the whole Dominion, and this sovereignty resides in the federal executive power.

Before confederation, each of the Provinces was invested with

(1) 9 H. L. C. 654. (2) 6 B. & S. 22. (3) L. R. 15 Eq. 355.

this character of sovereignty ; but, in joining the federal union, each of them made a full surrender to the central government of this sovereignty, with its privileges, prerogatives, and attributes, as also of the revenues proceeding from the exercise of said privileges, prerogatives, and attributes. By the B. N. A. Act, 1867, has been reconveyed to the separate Provinces by the central power, some of these rights and revenues, and only from such reconveyance can the Provinces derive their right and title (*Reg.* v. *Taylor*, 36 U. C. Q. B., p. 191).

This sovereignty of the federal government is the foundation principle of our constitution ; the one which most particularly distinguishes it from the constitution of the United States, in which, as we know, the opposite principle prevails. There each of the States of the Union is quasi sovereign, each of the States has all the rights, powers and privileges which it has not expressly surrendered to the general government. With us, the general government has all the rights, powers and privileges, all the attributes of sovereignty which, by the B. N. A. Act, have not been expressly reserved to the Provincial government. (Debates on Confederation, pp. 33, 34, 41, 404.) In regard to the prerogative of pardon for instance : this prerogative, by the resolutions adopted by the Canadian Parliament, was given to the Lieutenant-Governors in each Province. But, as I think very wisely, the Imperial Parliament wished to leave this prerogative to the Governor-General, to the federal executive power. Now, is it said in the Act, "The prerogative of pardon shall belong to the Governor-General ?" Not at all. But the clause was struck out, which, by way of an exception, gave this privilege to the provincial executives, and so by the very silence of the statute on this prerogative, it as well as others not expressly reconveyed, remains with the executive power of the Dominion.

It is the same with the right of escheat. As the Act has not [182] specially reserved it to the Provinces and the local authorities, it belongs to the central power. Hence, if the right, the prerogative, belongs to the central power, it is plain that the resulting revenue must belong to it also. Under our constitutional government, in England as in Canada, the Sovereign surrenders to the people all its hereditary patrimony as Sovereign, and all the revenues attached to the Crown, and receives in exchange from its subjects a civil list voted by Parliament, (1 & 2 Vict. c. 2. Imp.) These revenues are united to what is called the consolidated fund, of which they form a part. Upon this fund the Parliament, on behalf of the people, charges all the public

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expenses for which the Sovereign is no longer liable. (Wharton's Law Lexicon, v. Queen & Civil List ; 1 May's Const. Hist. p. 186 *et seq* ; 1 Todd's Par. Gov. p. 167.)

But the civil list properly so called is the sum voted to the Sovereign personally for his own use and that of the royal family, and the royal household. The local Legislatures strictly speaking do not vote, and are not called upon to vote, a civil list, as was said at the argument by the learned counsel for Quebec. Here the civil list is regulated and established with the changes which the Act itself allowed to be made therein by Con. Stat. Canada, c 10, s. 2, as follows : "There shall be payable in every year to Her Majesty, her heirs and successors, out of the Consolidated Revenue Fund of this Province, a sum not exceeding £47,988,15s. 6d., for defraying the expense of the several services and purposes named in the following schedule A."

This schedule A comprises the salary of the Governor-General. And indeed strictly speaking, so far as we are concerned, the whole civil list consists in the salary of the Governor-General, payable by the Parliament of the Dominion, and charged on the Federal Consolidated Fund by sect. 102 of the B. N. A. Act, as now fixed by sect. 105 of this Act, and our own Act, 32-33 Vict. c. 74.

And in consideration of the sums fixed for the salary of the Governor-General, and of the other charges on the civil list created by the said Con. Stat. Canada, c. 10, sect. 5 of that Act provides : "During the time for which the sums mentioned in the said schedule are severally payable, the same shall be accepted and taken by Her Majesty, by way of civil list, instead of *all* territorial *and other revenues* at the disposal of the Crown, arising in this Province," . . . and the Act directs that these revenues shall form part of the Con-[183] solidated Fund. Now among the royal revenues thus surrendered to the former Province of Canada, are certainly included estates accruing to Her Majesty by right of escheat ; and these estates fall into the Consolidated Fund, and become subject to the disposal of the said former Province of Canada.

Now by the B. N. A. Act, all rights and revenues which before the Union belonged to the Province of Canada, now belong to the federal government, and form part of the Consolidated Fund of the Dominion. There is only one exception as to rights and revenues pre-existing : that of the rights and revenues expressly reserved by the Act itself to the Provincial Legislatures. Now it is plain, as I

have already said, that this reservation has not been made as to rights of escheat and the revenues derived therefrom.

"*All duties and revenues* over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union *had and have power of appropriation, except such portions thereof* as are by this *Act reserved to the respective Legislatures of the Provinces*, or are raised by them in accordance with the special powers conferred on them by this Act shall form one Consolidated Revenue Fund, to be appropriated for the public service *of Canada*, in the manner and subject to the charges in this Act provided." Sect. 102.

As to the Provinces: "Such *portions* of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union power of appropriation *as are by this Act reserved to the respective governments or Legislatures of the Provinces*, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund, to be appropriated for the public service of the *Province*." Sect. 126. To the Consolidated Fund *of the Dominion* belong all the rights and revenues which are not expressly given to the Provinces. To the Consolidated Fund of the Provinces, *nothing* which is not expressly given them.

Edward Fraser died intestate in the Province of Quebec without heirs or wife him surviving. The Government of Quebec claims the estate from the curator, the Government of the Dominion, claims that this estate reverts to it, and asks to be allowed to intervene in the suit to oppose the claim of the Government of Quebec. This right to intervene is opposed by the Government of Quebec, which denies the claims of the Government of the Dominion.

For the foregoing reasons I pronounce in favour of the Government of the Dominion.

PRIVY COUNCIL.

J. C.* 1883 Nov. 6, 7; Dec. 1.

THE COLONIAL BUILDING AND INVESTMENT ASSOCIATION ..... } *Defendants;*

AND

THE ATTORNEY-GENERAL OF QUEBEC .... *Plaintiff.*

On appeal from the Court of Queen's Bench for the Province of Quebec.

[*Reported 9 App. Cas. 157.*]

B. N. A. Act, 1867, ss. 91, 92—37 Vict. c. 103, D.—Powers of Dominion Parliament.

Held, That Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires of the said Parliament.

Held, further, that the corporation could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose.

Loranger v. *The Colonial Building and Investment Association* (*ante* vol. 2, p. 275) reversed.

Appeal from a judgment of the Court of Queen's Bench (March 24, 1882) (1) reversing a judgment of the Superior Court (July 9, 1881) in favour of the appellants

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) *Post*, p. 133.

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in the matter of a petition by the respondent for a declaration that the appellants' association had been and was illegally formed and incorporated, and for an order dissolving the said association, and prohibiting the appellants from acting in future as such corporation.

STATEMENT.

The proceedings out of which this appeal arose were instituted by the Attorney-General for Quebec, under Art. 997 and following articles of the Code of Civil Procedure for Lower Canada. They were commenced by a petition in the nature of an information filed the 1st of April, 1881, followed by an answer on the 7th of April, 1881. The association was incorporated by the Cana- [158] dian Act, 37 Vict. c. 103. The pleadings, the Act, and the provisions of the Civil Procedure Code on which the proceedings were based, sufficiently appear in the judgment of their Lordships.

On the 24th of March, 1882, the Court of Queen's Bench (Dorion, C.J., Tessier, Cross and Baby, JJ.) delivered judgment (Monk, J., dissenting), reversing the judgment of the Superior Court, which had dismissed the petition and quashed the writ, and instead thereof adjudged and declared that the defendant company had and has no right to act as a corporation for or in respect of any of the operations of buying, leasing, or selling of landed property, buildings and appurtenances thereof; or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same; or the establishment of a building or subscription fund for investment or building purposes; or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property, or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec; and prohibited the said company from acting as a corporation within the

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STATEMENT.

Province of Quebec for any of the ends or purposes aforesaid; and further condemned the company to pay the plaintiff the costs as well of the Court below as of the appeal.

Matthews, Q.C., and *Fullarton*, for the appellant, said that the three main questions were, first, whether the company was legally incorporated; secondly, whether it is entitled to hold lands in Quebec, having regard to the local law of mortmain; thirdly, whether the judgment is founded on the petition. As regards the first, see B. N. A. Act, 1867, ss. 91, 92; *Citizens' Insurance Company* v. *Parsons* (1); a company like this could not be incorporated by any provincial Legislature. As regards the second, this trading corporation would not under the old French law have come within the definition of main morte. The Civil Code of Lower Canada, arts. 364, 366, made a difference, see *The Chaudière Gold Mining Company* v. *Desbarats* (2). There are certain Building Acts [159] of the provincial Legislature which are said to be violated by this company; but it is not a building association within the meaning of those Acts. It is admitted that the appellant company may not acquire land contrary to the provisions of any local law; but it is contended that no such illegal acquisition is shewn, and if shewn would not support the prayer of the petition. As regards the third point, the declaration and prohibition pronounced by the Court are not those asked for by the petition. They are not founded on the process before the Court, and not relevant to the issues of law and fact raised by the pleadings. The provisions of the Procedure Code applicable to these proceedings shew that their validity and the jurisdiction of the Court therein depend upon and are limited by the information and the conclu-

(1) 7 App. Cas. 96; *ante* vol. 1, p. 265. (2) L. R. 5 P. C. 277.

sions thereof; and that the issues to be tried and the proof to be adduced are similarly limited: see sects. 997, 998 (amended by Quebec Act, 35 Vict. c. 6, s. 21), 999, 1114, 1115.

Gibbs, Q.C., and *Boddam* (*Girouard*, Q.C., of the Canadian Bar, with them), for the respondent, contended that the appellant company could do all it wanted provided it obtained the consent of the local Legislatures: see Civil Code, s. 358. Not having done so its acts are illegal, that is, in violation of the local laws. The company is not illegally incorporated—its powers are only incapable of being exercised at present, this can be remedied. (SIR MONTAGUE E. SMITH:—The Attorney-General was bound to lay distinct grounds; having charged illegal incorporation, can you convert that into a totally distinct charge?) Reference was made to sects. 4 and 33 of the Act under discussion. The words in the petition "without being legally incorporated or recognised" are sufficient to challenge illegality other than that of incorporation: see sect. 997 of Civil Code Procedure. (SIR BARNES PEACOCK:—The Court cannot in a proceeding like this give an injunction; it can only do one of two things under sect. 1007 and sect. 1008.) Those sections must be read with sect. 997. The object of the Act is to create a building society for provincial purposes, and those purposes cannot be effected without the aid of the provincial Legislature, and in contravention of the Building Acts of the Province.

[160] The counsel for the appellants were not called upon to reply.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Court of

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JUDGMENT.

Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney-General of the Province, praying that it be declared that the appellant company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict. c. 103).

The preamble states—

That the persons thereinafter named "owners of real estate in the city and district of Montreal, and elsewhere in the Dominion, have petitioned for an Act of Incorporation, to establish an association to be called the 'Colonial Building and Investment Association,' whereby powers may be conferred on the said association for the purpose of buying, leasing, or selling landed property, buildings, and appurtenances thereof; for the purchase of building materials, to construct an improved class of villas, homesteads, cottages, and other buildings and premises, and to sell or let the same; and for the purpose of establishing a building or subscription fund, to which persons may subscribe or pay in money for investment or for building purposes, and from which payments may be made for said purposes; and also to act as an agency."

Sect. 1 incorporates the association.

Sect. 4 enacts that the association shall have power to acquire and hold, by purchase, lease, or other legal title any real estate necessary for the carrying out of its undertakings; to construct and maintain houses or other buildings; to let, sell, convey, and dispose of the said property; to acquire and use or dispose of every descripti n

[161] of materials for building purposes; to lend money on security, by mortgage on real estate, or on Dominion or Provincial Government securities, or on the stocks of chartered banks in the Dominion; and to acquire, hold, and dispose of public securities, stocks, bonds, or debentures of any corporate bodies, and other defined securities. The clause provides that the association shall sell the property so acquired within five years from the date of the purchase thereof.

Sect. 5 enables the association to act as an agency and trust company.

Sect. 11 provides that the chief office of the association shall be in the city of Montreal, and that branch offices or agencies may be established in London, England, in New York, in the United States of America, and in any city or town in the Dominion of Canada, for such purposes as the Directors may determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the association may be made payable at any of the said offices or agencies.

The secretary of the association, the only witness called in support of the petition, proved that the association had bought lands, erected houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operations had hitherto been confined to the province of Quebec, though efforts had been made to extend the business of the company to other provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the association to raise sufficient capital.

In order to understand the question which ultimately became the principal one to be considered in this appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney-General's petition,

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it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition, and the nature and form of the judgment appealed from.

The heading of chapter 10, sect. 1, of the Code is, "Of Corporations illegally formed, or violating or exceeding their powers."

[162] Art. 997 is as follows:—

"In the following cases,—

"(1) Whenever any association or number of persons acts as a corporation without being legally incorporated or recognised;

"(2) Whenever any corporation, public body, or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, privileges, and franchises, or exercises any power, franchise, or privilege which does not belong to it, or is not conferred upon it by law, it is the duty of Her Majesty's Attorney-General for Lower Canada to prosecute in Her Majesty's name such violations of the law whenever he has good reason to believe that such facts can be established by proof in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding; and in such case the special information must mention the names of the person who has solicited the Attorney-General to take such legal proceedings, and of the person who has become security for costs."

Art. 998 (as amended) reads:—

"The summons for that purpose must be preceded by the presenting to the Superior Court, or to a judge, of a special information containing conclusions adapted to the

nature of the contravention, and supported by an affidavit to the satisfaction of the Court or judge, and the writ of summons cannot issue upon such information without the authorization of the Court or judge."

The material allegations of the petition filed by the Attorney-General are the following:—

"That the 'Colonial Building and Investment Association' for years past have been and still are acting as a corporation in the city of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been [163] buying, leasing, and selling landed property, buildings, and appurtenances thereto, constructing villas, homesteads, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypothec on real estate in this province, the whole without being legally incorporated or recognised.

"That the operations and business of the said association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said association could not lawfully be incorporated, except by or under the authority of the Legislature of the Province of Quebec.

"That the said association was incorporated by the Parliament of Canada, in the year 1874, 37 Vict. c. 103, and has ever since been in operation under the said Act of incorporation which, for reasons above alleged is null and void and of no effect, the said Act of incorporation being ultra vires.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said defendants

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be adjudged and declared to have been, and to be illegally formed and incorporated, and that the said illegal association may be ordered to be dissolved, and be declared dissolved, and finally, that the defendants be prohibited from acting in future as such corporation, the whole with costs distraits to the undersigned attorneys."

The petition was verified by affidavit, as required by the Code, and thereupon an order for a writ of summons against the company was issued by a judge.

The petition also alleges that it was presented at the solicitation of John Fletcher, a shareholder of the company, who had become security for costs. It appears that Fletcher was in default in payment of his calls, but in the view their Lordships take of the case any further reference to this relator becomes immaterial.

The broad objection taken by the Attorney-General in the petition is, that the association was not legally incorporated, the statute incorporating it being ultra vires of the Parliament of the Dominion.

[164] The judgment of the Superior Court, given by Mr. Justice Caron, distinctly overruled this objection. Mr. Justice Tessier is the only Judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorion, in a judgment which received the concurrence of two other judges, acknowledged that having regard to the observations of this Board in the case of *The Citizens' Insurance Company of Canada* v. *Parsons* (1), it could not be held that the incorporation of the association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the Court gave judgment upon the assumption, as their Lordships understand the reasons of the Judges, that the association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows:—

"That the said company, respondents, had and have no

(1) 7 App. Cas. 96; *ante* vol. 1, p. 265.

right to act as a corporation for or in respect of any of the said operations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said company, respondents, from acting as a corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the association was not lawfully incorporated. Although the observations of this Board in the *Citizens' Insurance Company of Canada* v. *Parsons* (1), referred to by the Chief Justice, put a hypothetical case by way of illustration only, and [165] cannot be regarded as a decision on the case there supposed their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies.

It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and con-

(1) 7 App. Cas. 96; *ante* vol. 1, p. 265.

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sequently that its incorporation belonged exclusively to the provincial Legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz., that the company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act.

Their Lordships therefore think that the Courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition, that the association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which, shortly stated, declares that the association has no right to act as a corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the counsel for the Attorney General that, on the assumption that the corporation was [166] duly constituted, the prohibition was too wide, and

embraced some matters which might be lawfully done in the province, but it was urged that the operations of the company contravened the provincial law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the building Acts of the province.

It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognised by this Board, and held to apply to foreign corporations in the case of the *Chaudière Gold Mining Company* v. *Desbarats* (1). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of sect. 92 of the B. N. A. Act, viz., "Property and Civil Rights in the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the company to override it. But the powers found in the Act of incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold lands in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so.

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It is said, however, that the company has, in fact, violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation, by a corporation, of the mortmain laws, would involve an inquiry open-[167]ing questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

So with respect to the objections founded on the Acts of the Province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the Legislature of the Province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the association in question.

If the association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may doubtless be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed, with reference to the supposed contravention of the mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains. The first paragraph, after stating

that the corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognised."

The second paragraph avers that the operations of the company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the province, "could not lawfully be incorporated except by the authority of the Legislature of the Province."

The third paragraph alleges that, for these reasons, "the Act of incorporation is null and void, the said Act of incorporation being ultra vires."

The conclusion and prayer based on these allegations [168] are, that the association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case which, assuming a lawful incorporation, rests on the supposed infringement of the laws of the Province by the company in conducting its operations. This is not the wrong struck at by the petition, but a wrong-doing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the company's secretary were of a general nature, and mainly directed to support the allegation in the petition that the company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held, nor of any particular transaction, was gone into at the hearing.

The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the Court containing "conclusions adapted to the nature of the contravention," to be sup-

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ported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by the Attorney-General; so that neither the general principle regulating procedure nor the special requirements of the Code allow of its being set up on these proceedings.

If the company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the [169] special law of any one Province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the company "be prohibited from acting in future as a corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused, there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the

judgment of the Court of Queen's Bench is not an injunction limited to restraining the company from doing specified acts in violation of particular laws of the province, but is a general prohibition founded on a declaration introduced by the Court, other than those prayed for, that the company has no right to act as a corporation in dealing with lands and buildings, and certain other matters within the province. This declaration, with the prohibition founded on it, is obviously too extensive. A prohibition in these wide and sweeping terms would prohibit the company from acquiring or dealing in lands, though it had the Crown's consent, and could only be warranted by affirming the invalidity of the Act of incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their Lordships' view; or at least by affirming that the company, in exercising its powers in the province, must necessarily violate the provincial law, which, as already shewn, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment of the Superior Court be affirmed, and that the present appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present respondent. The appellant must also have the costs of the appeal to Her Majesty.

JUDGMENTS IN QUEBEC COURT OF QUEEN'S BENCH (1).

MONK, J :—

I regret I cannot concur in the judgment about to be rendered by the Court. I would without hesitation confirm the decision rendered

(1) [The formal judgment of the Court of Queen's Bench is reported *ante* vol. 2, p. 275. The reasons of the judges here given are from the Record of Proceedings printed on the appeal to the Privy Council, for a copy of which the editor is indebted to Mr. Girouard, Q.C.]

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by the Superior Court. The ground of complaint as set forth in the information is "That the operations and business of the said association have been limited to the Province of Quebec, and being moreover of a merely local or private nature in the said Province and having provincial objects affecting property and civil rights in the said Province, the said association could not lawfully be incorporated except by or under the authority of the Legislature of the Province of Quebec."

It is not pretended that the law as passed by the Dominion Legislature was or is ultra vires the contention is that the company having commenced business in the Province of Quebec by virtue of the statute in question renders the law inoperative, and that the association should be dissolved, and to do so this Court must declare it to have been illegally formed and incorporated. Now there can be no doubt whatever that the enacting of this law was exclusively within the powers and jurisdiction of the Federal Parliament. This view of the case is not disputed even by this Court, but it is urged that because the company has not so far extended its operations to the full limits of its corporate authority, the Act is therefore, they contend, ultra vires and the company should be dissolved. This appears to be a most extraordinary idea. I cannot concur in adjudging that the partial or an incipient compliance with a statute would authorize this Court in setting it aside ; so long as the law stands and is unassailable by Courts of Justice and the corporation has a legal existence, we cannot interfere. The Dominion legislature probably foresaw that the important operations of the company would have to have a commencement somewhere and why not in the Province of Quebec, as well as elsewhere ? I see no reason for such a view of this matter. Should the company wholly fail in the future to fulfil reasonably the obligations imposed on it and thereby frustrate the objects of the Legislature, the Federal Parliament can and probably would take some action should such a contingency arise, but at present it appears to me this Court cannot interfere.

[*Translated.*]

TESSIER, J. :—

A writ of quo warranto, issued at the instance of the Attorney-General of the Province of Quebec, addressed to the association who are the defendants herein, and who are incorporated by virtue of an Act of the Parliament of Canada of 1874, 37 Vict. c. 103.

The allegations are well summed up in the very words of the petition which alleges : "That the operations and business of the said association have been limited to the Province of Quebec, and being moreover of a merely local or private nature in the said Province, the said association could not lawfully be incorporated except by or under the authority of the legislature of the Province of Quebec."

The conclusions flow necessarily from the premises and are as follows : That the association be adjudged and declared to have been, and to be illegally formed and incorporated, and "that the said illegal association may be ordered to be dissolved and be declared dissolved," and finally that the defendants be prohibited from acting in future as such corporation, with costs.

It is alleged in the petition that this Act of incorporation is ultra vires of the Parliament of Canada.

The association replied that its Act of incorporation was within the jurisdiction of the Parliament of Canada, because it was thereby authorized to exercise powers and privileges, and to act and contract in all the Provinces of the Confederation.

According to the evidence and the admissions it appears that this association has limited its operations to the Province of Quebec, but that is not the point in issue. The real question is whether the operations which the association is authorised to carry on by virtue of its Act of incorporation are among those which are within the exclusive jurisdiction and powers of the local Legislature of Quebec.

Section 92 of the confederation Act says that, "in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated," inter alia.

No. 10. "Local works and undertakings."

No. 13. "Property and civil rights in the Province."

No. 16. "Generally all matters of a merely local or private nature in the Province."

Let us now see what are the powers conferred on this association.

The preamble of the statute indicates the principal object : "To buy, lease or sell landed property, buildings and appurtenances.

Sections 4, 5, 6 and those which follow particularise and formulate these powers : "to buy, sell, and rent lands and buildings . . . to erect and build houses, to acquire and sell building materials . . . to own mortgages and securities, to mortgage and lease real estate."

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By sections 13, 20, 27, 33, 34, 36, 37, 39 and 40 rules of civil procedure and rules concerning property and civil rights, and the form and effects of contracts are established. It is evident that all these matters fall within the exclusive jurisdiction of the Legislature of Quebec.

However, the defendants object, that by sect. 11 they have a right to establish branches or agencies in all the towns of Canada, at London also in England, and at New York in the United States of America, and that only the Parliament of Canada can confer this right. This is a mistake, the Legislature of Quebec can just as well create an association or legal person of this kind ; the power conferred on this private corporation of establishing an agency at London or at New York, belongs to it, as it belongs to every individual whatsoever, provided he submits to the laws of the country in which he establishes that agency. In like manner a corporation created by the Legislature of Quebec, has a right to carry on business at Toronto, provided it submits to the laws in force in the Province of Ontario.

It is necessary, then, to consider two things in the creation of corporations : 1st, the privilege of being constituted a corporation which power is common to the Federal Parliament and to the Provincial Legislatures ; 2nd, the object and nature of the powers of the corporation so created. It is at this point that in certain matters a division is made between the jurisdiction of the Provincial Legislatures and that of the Federal Parliament.

In the case of a written constitution such as ours, the distribution of powers is subject to the interpretation of the Courts in order to keep the Federal Parliament and the local Legislatures within the limits of their respective powers.

Suppose a statute like the present had been passed by the Legislature of Quebec, could it be maintained that it was ultra vires? It would be a refinement to contend that because there is a question about debentures and interest coupons, the Act is within the powers of the Federal Parliament ; that is not the main object of the statute, but only an accessory to the main object, and that accessory becomes subject to the general laws of Canada.

If the statute in question is within the competence of the Parliament of Canada, one may reflect on the hundreds of statutes of the provincial legislatures incorporating companies for mining phosphates, for manufacturing cloth, cotton, shoes, colonisation, land improvements, and land companies, and say, that provided it is said that these companies can have a branch or agency at Toronto and at

Quebec, or at New York and London, they fall under the jurisdiction of the Federal Parliament.

The judgments lately delivered by the Privy Council in England give us rules of interpretation which can be applied in the present case. In *Citizens Insurance Company* v. *Parsons* (1) the Judges of the Privy Council said: "Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the (Imperial) Legislature could not have intended that the *powers exclusively assigned to* the Provincial Legislature should be absorbed in those given to the Dominion Parliament . . . . In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers."

From all this we must conclude that the creation of a corporation for objects relating to or extending to property and civil rights falls exclusively under the control of the local Legislature, and that to remove it therefrom the object of incorporation must be one, so to say, of interprovincial law, that is to say, one in which the Federal Parliament has the right to establish the rules of civil right and of property in all the Provinces in a uniform manner.

Now in the Province of Quebec, corporations have not the power of possessing or mortgaging property, except by a special law, amending in that respect the civil laws relating to property. It would then be an interference with our laws of property, if the Parliament of Canada could control, modify or change them as has been done by this statute. It is the local Legislature which has this exclusive right.

We must then declare, that this statute is ultra vires of the Federal Parliament, and that the corporation in question is dissolved. It still has the power of applying to the local Legislature for the purpose of being re-constituted with the necessary corporate powers.

DORION, C.J.:—

This appeal arises out of proceedings adopted by the Attorney-General of the Province of Quebec, under Article 997 of the Code of Civil Procedure, to test the right of the respondent to act as an

(1) 7 App. Cas. 96, 108; *ante* vol. 1, 265, 272.

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incorporated building society, and as such to acquire and sell real estate situated within the Province.

By an Act of the Parliament of Canada, passed in the 37th year of Her Majesty's Reign, c. 103, William Rodden and others were incorporated under the name of the Colonial Building and Investment Association, for the purpose, as stated in the preamble of the Act, "of buying, leasing, or selling landed property, buildings and appurtenances thereof," etc.

The company is not by its Act of incorporation restricted to carry on business in the Province of Quebec, although it would seem from several clauses of the Act and from the legal terms used in sections 4, 34, 35 and the reference in section 36, to the Code of Civil Procedure of Lower Canada, that the principal, if not the sole object of the company was to carry on its operations in the Province of Quebec, and it has been established in evidence, that since its organisation, in 1874, the company has been carrying on business exclusively in that Province, where it has purchased real estate to a very large amount.

Under this state of facts two questions are raised.

1st. Had the Parliament of Canada the right to incorporate a building society to carry on business in the Province of Quebec exclusively?

2nd. Is the power conferred upon this company to acquire lands in the Province of Quebec contrary to the laws of mortmain in force in the Province? and, if so, had the Parliament of Canada any authority to except the company respondent from the operation of those laws?

Before the B. N. A. Act was passed, the organisation of building societies was considered as so intimately connected with the different system of laws in force in each of the two Provinces of Upper and Lower Canada, that although under the union which then existed, all the laws affecting them were enacted by one and the same legislative body, it was found necessary to have on this subject, a separate legislation for each Province. The dispositions applicable to Lower Canada were contained in the Lower Canada Consolidated Statutes, c. 69, and those applicable to Upper Canada, in the Consolidated Statutes of Upper Canada, c. 53.

Since the union of the Provinces under the B. N. A. Act, c. 69 of the Lower Canada Consolidated Statutes has been twice amended and partly repeated by the Legislature of the Province of Quebec, first, in 1875, by 39 Vict. c. 61, and secondly, in 1878, by 41 Vict. c. 20.

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In 1878, the Parliament of Canada by 40 Vict. c. 50, also amended and partly repealed the same c. 69 of the Lower Canada Consolidated Statutes, and in 1879 both the Parliament of Canada and the Legislature of the Province of Quebec, the first, by 42 Vict. c. 48, and the second, by 43 Vict. c. 32, made provisions for the voluntary liquidation of building societies in the Province of Quebec.

Chapter 69 of the Con. Stat. of Lower Canada has therefore been considered by the Parliament of Canada as being a Dominion law, and been twice dealt with as such, while it has been three times amended by the Legislature of Quebec as a Provincial law.

The Provincial Legislatures have the same exclusive right under sect. 92 of the B. N. A. Act, to pass laws relating to the subjects therein mentioned, as the Parliament of Canada has under sect. 91 to pass laws on subjects not expressly assigned to the former.

It seems therefore impossible that both legislative bodies should have had the right to amend and repeal in whole or in part, the provisions of c. 69 of the Consolidated Statutes of Lower Canada.

The question was submitted to us in the case of *McClanaghan* v. *the St. Ann's Mutual Building Society*, (1) and we there decided on the authority of *L'Union St. Jacques* v. *Belisle*, (2) that c. 69 of the Con. Stat. of Lower Canada having a provincial object and affecting civil rights, came within the exclusive jurisdiction of the Provincial Legislature under sub-sects. 10, 11, 13 and 16 of sect. 92 of the B. N. A. Act, and that the Act 42 Vict. c. 48, passed by the Parliament of Canada, to provide for the liquidation of building societies in the Province of Quebec, was ultra vires. We, at the same time, maintained the Act of the Quebec Legislature, 43 Vict. c. 32, which had the same object as the Dominion Act. We thereby held that the Provincial Legislature had exclusive control over the Acts authorising the establishment of building societies in the Province of Quebec.

It is however argued that the company, respondent, is not incorporated for the purpose of doing business in the Province of Quebec only, but in all the Provinces of the Dominion, and that as none of the Provinces could pass such an Act, the authority to do so vested in the Dominion Parliament, the subject not coming within any of the classes of subjects assigned exclusively to the Provincial Legislatures by sect. 92 of the Imperial Act.

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(1) 24 L. C. J. 162; *ante* vol. 2, p. 237.
(2) L. R. 6 P. C. 31; *ante* vol. 1, p. 63.

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In the case of *Regina* v. *Mohr* (1), this Court held that a company incorporated by an Act of the Parliament of Canada (43 Vict. c. 67), to establish telephone lines in the several Provinces of the Dominion, had no right to establish an independent line of telephone wholly within the Province of Quebec and not connecting this Province with any other of the Provinces, or not being extended beyond the limits of the Province, as such independent telephone line did not come within any of the exceptions contemplated in paragraphs *a*, *b* and *c* of sub- sect. 10 of sect. 92 of the B. N. A. Act. Our judgment in that case was based on an express provision of the Act applying to lines of steamships, railways, telegraphs and other similar undertakings. Building societies are not expressly mentioned in that sub-section, and their object is not of the same character, as the works and undertakings to which it refers. Although it is difficult to understand why a different rule should prevail, yet it cannot be said that building societies come within the express provision of sub-sect. 10, and that decision is not therefore inconsistent with the opinion expressed by the Judicial Committee of the Privy Council in the case of *The Citizens' Ins. Co.* v. *Parsons* (2). In that case, their Lordships in their observations on the judgment of Mr. Justice Taschereau of the Supreme Court, expressed themselves to the effect, that the power to incorporate an insurance company to carry on business in one of the Provinces of the Dominion, lay with the Legislature of that Province ; while the incorporation of companies to carry on business throughout the whole Dominion or in more Provinces than one, was vested in the Parliament of Canada, as not coming within the classes of subjects exclusively assigned to the Provincial Legislatures.

Although the question alluded to was not specially raised in the case of *The Citizens' Ins. Co.* v. *Parsons* (2), yet the opinions expressed were so directly to the point, that we do not feel it would be competent for us to consider the question as being now an open one.

We do not, however, consider that the opinion so expressed covers the present case. Here we have a company incorporated to carry on its operations throughout the whole Dominion, which assumes to do business in one Province only, that is, in the Province of Quebec. The exclusive right of the Legislature of that Province to regulate the establishment of building societies within its own limits would

(1) 7 Quebec Law Rep. 183; *ante* vol. 2, p. 257.
(2) 7 App. Cas. 96; *ante* vol. 2, p. 265.

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be destroyed if the Parliament of Canada could by granting general powers, authorise a company to act within one of the Provinces only. The inconvenience resulting from the exercise of such a power is well exemplified in the present case. If the company, respondent, had been incorporated under the Acts in force in the Province of Quebec, relating to building societies, it would only have obtained the limited powers conferred upon such societies by c. 69 of the Consolidated Statutes of Lower Canada and its amendments, but by going to the Parliament of Canada for a special Act of incorporation, it has obtained powers of a much more extended character, and such as are not conferred on other building societies in the Province of Quebec.

As the Dominion Parliament could not directly incorporate a building society to do business exclusively in the Province of Quebec, it would seem that a company incorporated to do business throughout the whole Dominion cannot restrict its business to one Province only, without infringing on the exclusive right of the Legislature of such Province to grant the authority necessary for that purpose.

We now come to the second question relating to the power granted to the company, respondent, to acquire and hold land, to an unlimited extent within the Province of Quebec.

In the case of *The Chaudière Gold-mining Company* v. *Desbarats* (1) it was held by the Judicial Committee of the Privy Council, confirming the judgments of both the Superior Court and of this Court, that a corporation, whether foreign or domestic, is incapacitated from acquiring as well as from holding lands in Lower Canada, without the permission of the Crown being first obtained. This restriction relates to property and civil rights (Art. 366 and 836 Civil Code of L. C.), and as such can only be removed by the Legislature of the Province of Quebec. The Parliament of Canada, although it may have the power to incorporate companies to do business throughout the whole Dominion, has no right to alter or repeal the general or special laws of the several Provinces affecting the tenure of lands or the right to acquire and hold lands therein.

This question was formally decided in the case of *The Citizens' Ins. Co.* v. *Parsons*, already cited, and apart from the general rule there laid down, we find in the exhaustive judgment of their Lordships the following passage, p. 117 :—" But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words, ' the regulation of trade and commerce ') that because

(1) L. R. 5 P. C. 277.

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the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive legislative power, 'over property and civil rights in the Province') that it could hold land in that Province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

The supposed case commented upon by their Lordships is exactly the one we have to deal with. The Civil Code in the articles already cited prohibits the acquisition of immoveable property by corporations without the previous permission of the Crown, and c. 69, Con. Stat of Lower Canada (sects. 13 and 23), has specially guarded against the accumulation of landed estate, in the hands of building societies, by providing that they could only hold real estate as security for loans made by such societies, or for moneys due for the payment of stock; the only power to hold real estate absolutely being limited to an amount of $6,000. Yet the Dominion Parliament in contravention to both the general laws of the Province and the special laws enacted in reference to building societies, has incorporated the company respondent for the very purpose, as stated in the preamble of the Act, of buying, leasing, and selling landed property, buildings and appurtenances (37 Vict. c. 103, preamble and sect. 4), and it is in evidence that acting under this Act, the company respondent has already acquired large tracts of land in the City of Montreal, and its immediate vicinity. Whatever, therefore, may be the ultimate decision as to the right of a company to do business in one Province only when that company is incorporated by the Parliament of Canada to do business throughout the whole Dominion, it is clear from the opinion expressed by the Judicial Committee of the Privy Council, that the company respondent had no power to deal in the purchase, lease and sale of real estate, etc., in the Province of Quebec.

We therefore consider the judgment of the Superior Court to have

been erroneous, and acting upon the suggestion contained in the above extract from the judgment in the *Citizens' Insurance Company* v. *Parsons*, without deciding that the whole Act incorporating the company respondent is ultra vires, we hold that the company has no right to exercise in the Province of Quebec, the powers conferred by its Act of incorporation to buy, lease and sell lands, etc., in the Province of Quebec, and it is by our judgment forbidden to do so.

CROSS and BABY, JJ., concurred with DORION, C.J.

PRIVY COUNCIL.

J. C.*
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Nov. 14, 15, 16;
Dec. 15.

ARCHIBALD G. HODGE..... .....*Appellant;*

AND

THE QUEEN.....*Respondent.*

On appeal from the Court of Appeal of the Province of Ontario.

(Reported 9 App. Cas. 117.)

B. N. A. Act, ss. 91, 92—Liquor License Act of 1877, R. S. O., c. 181—Powers of Local Legislature—Delegation—Imprisonment with Hard Labour.

Subjects which in one aspect and for one purpose fall within sect. 92 of the B. N. A. Act, 1867, may in another aspect and for another purpose fall within sect. 91.

Russell v. *The Queen* (7 App. Cas. 829 ; *ante* vol. 2, p. 12) explained and approved.

Held, that "The Liquor License Act of 1877," c. 181, Revised Statutes of Ontario, which, in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with the general regulation of trade or commerce, but comes within Nos. 8, 15 and 16 of sect. 92 of the Act of 1867, and is within the powers of the Provincial Legislature.

Held, further, that the Provincial Legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto.

"Imprisonment" in No. 15 of sect. 92 of the Act of 1867 means imprisonment with or without hard labour.

Appeal from a decision of the Court of Appeal (June 30, 1882), (1) allowing the respondent's appeal from a decision of the Court of Queen's Bench (June 25, 1881), (2) by

Present:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 7 App. Rep. 246 ; *post*, p. 166. (2) 46 U. C. Q. B. 141 ; *post*, p. 184.

which last mentioned decision it was ordered that a certain examination, made on the 19th day of May, 1881, by and before the Police Magistrate of the City of Toronto, on the information and complaint of one Thomas Dexter, whereby the appellant was convicted for that he, the appellant, did on the 7th day of May, 1881, unlawfully permit and suffer a billiard table to be used and a game of billiards to be played thereon, in his tavern, in the conviction named and described as the St. James' Hotel, situ- [118] ate within the City of Toronto, during the time prohibited by the "Liquor License Act," (Revised Statutes of Ontario, c. 181) for the sale of liquor therein, against the form of the resolution of the License Commissioners for the City of Toronto for regulating taverns and shops, passed on the 25th of April, 1881, should be and the same was quashed.

The appellant at the time of the alleged offence was the holder of a liquor license, issued on the 25th of April, 1881, by the board of License Commissioners for the City of Toronto, under the "Liquor License Act" of the Province of Ontario, in respect of the St. James' Hotel, which license remained in force until the 1st of May, 1882.

The appellant was also then the holder of a license dated the 24th of February, 1881, issued under the authority of the "Municipal Act" (Revised Statutes of Ontario, c. 174, s. 461), by the corporation of the City of Toronto, authorizing him to carry on the business or calling of a keeper of a billiard saloon with one table for hire, which last-mentioned license remained in force until the 31st of December, 1881.

The facts are stated in the judgment of their Lordships (1).

(1) [The shorthand writers' notes of the proceedings before the Judicial Committee in this case are printed in the Dominion Sessional Papers of 1884, vol. 17, Sessional Paper 30.]

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Kerr, Q.C. (of the Canadian Bar), and *Jeune*, for the appellant :—

First, the Ontario Assembly is not competent to legislate in regard to licenses for the sale of liquor, and the regulation of licensed houses. The B. N. A. Act, sect. 92, sub-sect. 9, empowers the Provinces to legislate in regard to shop and tavern licenses, but only for the purpose of raising a revenue. Sect. 91, sub-sect. 2, gives the regulation of trade and commerce to the Dominion. In the case of *Russell* v. *The Queen* (1) it was held that the power to prohibit and regulate the traffic belonged to the Dominion. It is very desirable that legislation on this subject should be uniform; and this cannot be secured if each Province can pass a licensing law of its own. Second, even if the Ontario Legislature could deal with the subject it could not delegate its powers to License Commissioners. In *The Queen* v. *Burah* (2) it is laid down that a Local Legisla- [119] ture cannot create a new legislative power not created or authorized by the Imperial Parliament. In this case the Local Legislature has assigned to three officials the power to define offences and impose penalties. But even if the statutory powers of the Commissioners are intra vires of the Legislature, this resolution is not a good exercise of their powers. They assume to regulate billiard tables which ought to be regulated by the City Council in accordance with the Rev. Stat. Ont. c. 174. The resolution is also bad because it places keepers of billiard tables who sell liquor at a disadvantage as compared with those who do not. A by-law discriminating in favour of one class of traders and against another is bad : see *Jonas* v. *Gilbert* (3). See also Cooley on Constitutional Limitations, pp. 201, 503.

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12. (2) 3 App. Cas. 889, 905.
(3) 5 Can. S. C. R. 356.

(LORD FITZGERALD:—We will take the passages from Cooley as part of your argument but not as authority.)

Lastly, there is no power in the Legislature or in the Commissioners to impose the punishment of hard labour. There is a wide difference between simple punishment and hard labour: Hawkins' Pleas of the Crown, p. 184; *Easton's Case* (1). The B. N. A. Act, sect. 92, sub-sect. 15, prescribes "fine, penalty or imprisonment," as the punishments to be imposed for breach of provincial laws. The decision in *Frawley's Case* (2) was based on the mistaken assumption that the Provinces surrendered their right into the hands of Parliament at confederation. There was a re-arrangement and transfer of some provincial powers to the Dominion, among others of the power to deal with criminal law, along with which the power to impose hard labour naturally goes. The penalty imposed by the resolution is a fixed penalty and therefore unreasonable: *Saunders* v. *South-Eastern Railway Company* (3).

Davey, Q.C., and *Æmilius Irving*, Q.C. (of the Canadian Bar), (*Raleigh* with them), for the Crown:—

This question must be decided by the rules laid down in *Citizens' Insurance Company of Canada* v. *Parsons* (4). [120] Does the Liquor License Act belong to any of the classes of subjects assigned to the Provinces? The liquor trade, like all other trades, is subject to local regulation for purposes of police. The Commissioners are a "municipal institution" within sub-sect. 8 of sect. 92 of the B. N. A. Act. The regulation of licensed houses is primarily a matter of police; the interference with "trade and commerce" is only incidental. *Russell* v. *The Queen* (5)

(1) 12 A. & E. 645.
(2) 46 U. C. Q. B. 153; 7 App. Rep. 246; *ante*, vol. 2, p. 576.
(3) 5 Q. B. D. 462.
(4) 7 App. Cas. 96; *ante*, vol. 1, p. 265.
(5) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

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establishes the right of the Dominion to legislate on the liquor traffic as a matter affecting the peace and good government of Canada. This is not inconsistent with the right of the Provinces to legislate on the same subject for purposes of police. This is recognised in sect. 112 of the Canada Temperance Act itself. Of course if the Province restricts any trade by requiring a license, that must be done bona fide for the purpose of raising a revenue. The right to regulate licensed houses is generally recognised in Canada, as appears from the cases collected in Cartwright's Cases on the B. N. A. Act: see *City of Fredericton* v. *The Queen* (1); *In re Slavin and the Corporation of Orillia* (2); *Reg.* v. *Justices of King's County* (3); *Keefe* v. *Maclennan* (4); *Blouin* v. *Corporation of Quebec* (5); *Corporation of Three Rivers* v. *Sulte* (6).

As to the delegation to Commissioners, the maxim delegatus non potest delegare does not apply to a Local Legislature: *The Queen* v. *Burah* (7). There is here no delegation of legislative authority—only of the powers to make by-laws. The resolution is within the powers of the Commissioners. They do not attempt to regulate billiard tables; it is as liquor licensee, not as billiard licensee, that the appellant is required to close his billiard saloon. As to the penalties which may be imposed, sect. 59 of the Liquor License Act prescribes fine and imprisonment; sect. 70 adds the powers for enforcing by-laws given to municipal councils by sects. 400-407, and sect. 454 of the Municipal Act, Rev. Stat. Ont. c. 174, and these powers include the imposition of hard labour. By Con. Stat. Can. 1859, c. 99, hard labour could be added

(1) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

(2) 36 U. C. Q. B. 159: *ante*, vol. 1, p. 688.

(3) 2 Pugsley, 535; *ante*, vol. 2, p. 499.

(4) 2 Russell & Chesley, 5; *ante*, vol. 2, p. 400.

(5) 7 Quebec L. R. 18; *ante*, vol. 2, p. 368.

(6) 5 Legal News, 330; *ante*, vol. 2, p. 280.

(7) 3 App. Cas. 889, 904.

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[121] to any sentence of imprisonment. That Act is still in force as to offences against provincial laws; as to offences against the criminal law (which is assigned to the Dominion) it has been re-enacted. The term "imprisonment" is very general, and includes imprisoment with hard labour: see Stephen, Digest of Criminal Law, art. 4, which gives the effect of 28 & 29 Vict. c. 126. In construing a conviction, the term "imprisonment" would not be assumed as against the prisoner to mean imprisonment with hard labour. But in construing an instrument of government such as the B. N. A. Act, a wide construction should be given to the powers of the Local Legislature: see Vattel, Book 2, c. 17, ss. 285, 286, cited in the judgment appealed from (1). The resolution is not open to objection as prescribing a fixed penalty, for by sect. 402 of the Municipal Act (incorporated in the Liquor License Act) the justice may commit "for the term or some part thereof specified in the by-law." They also referred to *Reg.* v. *O'Rourke* (2) and Archbold's Criminal, Pleading, 19th ed., p. 56.

Kerr, Q.C., in reply :—

The Provinces have a strictly limited jurisdiction, and though they may amend their constitutions, they may not take more power than Parliament gave them. "Municipal Institutions" includes only what was generally included under that head at confederation. In some of the Provinces the Legislature had never undertaken to restrict the liquor trade. He referred to *Dobie* v. *Temporalities Board* (3).

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The appellant, Archibald Hodge, the proprietor of a

1) See note (1), *post*, p. 169. (2) 1 Ont. Rep. 464; *ante*, vol. 2, p. 644.
(3) 7 App. Cas. 136; *ante*, vol. 1, p. 351.

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tavern known as the St. James' Hotel, in the City of Toronto, and who, on the 7th May, 1881, was the holder of a license for the retail of spirituous liquors in his tavern, and also licensed to keep a billiard saloon, was summoned before the Police Magistrate of Toronto, for a [122] breach of the resolutions of the License Commissioners of Toronto, and was convicted on evidence sufficient to sustain the conviction if the magistrate had authority in law to make it.

The conviction is as follows, viz.:—

"CONVICTION.

"Canada: Province of Ontario, County of York, City of Toronto, to wit:—

"Be it remembered, that on the 19th day of May, in the year of our Lord one thousand eight hundred and eighty-one, at the city of Toronto, in the County of York, Archibald G. Hodge, of the said city, is convicted before me, George Taylor Denison, Esquire, Police Magistrate in and for the said city of Toronto, for that he, the said Archibald G. Hodge, being a person who, after the passing of the resolution hereinafter mentioned, received, and who, at the time of the committing of the offence hereinafter mentioned, held a license under the Liquor License Act, for and in respect of the tavern known as the St. James' Hotel, situate on York Street, within the city of Toronto, on the 7th day of May in the year aforesaid, at the said city of Toronto, did unlawfully permit, allow and suffer a billiard table to be used, and a game of billiards to be played thereon in the said tavern, during the time prohibited by the Liquor License Act for the sale of liquor therein, to wit, after the hour of seven o'clock at night on the said seventh day of May, being Saturday, against the form of the resolution of the License Commissioners for the city of Toronto for regulating taverns

and shops, passed on the twenty-fifth day of April, in the year aforesaid, in such case made and provided.

"Thomas Dexter, of said city, License Inspector of the city of Toronto, being the complainant.

"And I adjudge the said Archibald G. Hodge, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law; and also to pay to the said Thomas Dexter the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, then I order that the same be levied by distress and sale of goods and chattels of the said Archibald G. Hodge; and in default of sufficient distress, I adjudge the said Archibald G. Hodge to be imprisoned in the common gaol of the said [123] city of Toronto and County of York, at Toronto, in the county of York, and there be kept at hard labour for the space of fifteen days, unless the said sums, and the costs and charges of conveying the said Archibald G. Hodge to the said gaol, shall be sooner paid."

On the 27th May, 1881, a rule nisi was obtained to remove that conviction into the Court of Queen's Bench for Ontario, in order that it should be quashed as illegal, on the grounds, 1st, that the said resolution of the said License Commissioners is illegal and unauthorized; 2nd, that the said License Commissioners had no authority to pass the resolution prohibiting the game of billiards as in the said resolution, nor had they power to authorize the imposition of a fine, or, in default of payment thereof, imprisonment for a violation of the said resolution; 3rd, the Liquor License Act, under which the said Commissioners have assumed to pass the said resolution, is beyond the authority of the Legislature of Ontario, and does not authorize the said resolution.

It will be observed that the question whether the Local Legislature could confer authority on the License

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Commissioners to make the resolution in question is not directly raised by the rule nisi. On the 27th June, 1881, that rule was made absolute, and an order pronounced by the Court of Queen's Bench to quash the conviction. The judgment of the Court, which seems to have been unanimous, was delivered by Hagarty, C. J., with elaborate reasons, but finally it will be found that the decision of the Court rests on one ground alone, and does not profess to decide the question which on this appeal was principally discussed before their Lordships. The Chief Justice, in the course of his judgment, says:—

"It was stated to us that the parties desired to present directly to the Court the very important question whether the Local Legislature, assuming that it had the power themselves to make these regulations and create these offences, and annex penalties for their infraction, could [124] delegate such powers to a board of Commissioners or any other authority outside their own legislative body."

And, again, he adds:—

"We are thus brought in face of a very serious question, viz., the power of the Ontario Legislature to vest in the License Board the power of creating new offences and annexing penalties for their commission."

And concludes his judgment thus, referring to the Resolutions:—

"The Legislature has not enacted any of these, but has merely authorized each Board in its discretion to make them.

"It seems very difficult, in our judgment, to hold that the confederation Act gives any such power of delegating authority, first of creating a quasi offence, and then of punishing it by fine or imprisonment.

"We think it is a power that must be exercised by the Legislature alone.

"In all these questions of ultra vires the powers of our

Legislature, we consider it our wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy.

"We, therefore, enter into no general consideration of the powers of the Legislature to legislate on this subject; but assuming their right so to do, we feel constrained to hold that they cannot devolve or delegate these powers to the discretion of a local Board of Commissioners.

"We think the defendant has the right to say that he has not offended against any 'law of the Province,' and that the convictions cannot be supported."

The case was taken from the Queen's Bench on appeal to the Court of Appeal for Ontario, under the Ontario Act, 44 Vict., c. 27, and on the 30th June, 1882, that Court reversed the decision of the Queen's Bench, and affirmed the conviction.

Two questions only appear to have been discussed in the Court of Appeal, 1st, that the Legislature of Ontario had not authority to enact such regulations as were [125] enacted by the Board of Commissioners, and to create offences and annex penalties for their infraction; and, 2nd, that if the Legislature had such authority, it could not delegate it to the Board of Commissioners, or any other authority outside their own legislative body.

This second ground was that on which the judgment of the Court of Queen's Bench rested.

The judgments delivered in the Court of Appeal by Spragge, C. J., and Burton, J. A., are able and elaborate, and were adopted by Patterson and Morrison, JJ., and their Lordships have derived considerable aid from a careful consideration of the reasons given in both Courts.

The appellant now seeks to reverse the decision of the Court of Appeal, both on the two grounds on which the case was discussed in that Court and on others technical but substantial, and which were urged before this Board

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with zeal and ability. The main questions arise on an Act of the Legislature of Ontario, and on what have been called the resolutions of the License Commissioners.

The Act in question is chapter 181 of the Revised Statutes of Ontario, 1877, and is cited as "The Liquor License Act."

Sect. 3 of this Act provides for the appointment of a Board of License Commissioners for each city, county, union of counties, or electoral district as the Lieutenant-Governor may think fit, and sects. 4 and 5 are as follows :—

"Sect. 4. The License Commissioners may, at any time before the first day of May in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say :—

"(1.) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, alehouses, beerhouses, or places of public entertainment.

"(2.) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and localities within which, and [126] the persons to whom, such limited number may be issued within the year, from the first day of May of one year till the thirtieth day of April inclusive, of the next year.

"(3.) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of

having all the tavern accommodation required by law.

"(4.) For regulating the taverns and shops to be licensed.

"(5.) For fixing and defining the duties, powers, and privileges of the Inspector of Licenses of their district.

"Sect. 5. In and by any such Resolution of a Board of License Commissioners, the said Board may impose penalties for the infraction thereof."

Sect. 43 prohibits the sale of intoxicating liquors from or after the hour of seven of the clock on Saturday till six of the clock on Monday morning thereafter.

Sect. 51 imposes on any person who sells spirituous liquors without the license by law required, or otherwise violates any other provision of the Act, in respect of which violation no other punishment is prescribed, for the first offence a penalty of not less than twenty dollars and not more than fifty dollars, besides costs, and for the second offence imprisonment with hard labour for a period not exceeding three calendar months.

Sect. 52. For punishment of offences against sect. 43 (requiring taverns, etc., to be closed from seven o'clock on Saturday night until six o'clock on Monday morning), a penalty for the first offence of not less than twenty dollars with costs, or fifteen days imprisonment with hard labour, and with increasing penalties for second, third and fourth offences; and sect. 70 provides that where the resolution of the License Commissioners imposes a penalty it may be recovered and enforced before a magistrate in the manner and to the extent that by-laws of municipal corporations may be enforced under the authority of the Municipal Act.

License Commissioners were duly appointed under this statute, who, on the 25th April, 1881, in pursuance [127] of its provisions, made the resolution or regulation

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now questioned in relation to licensed taverns or shops in the city of Toronto, which contains (inter alia) the following paragraphs, viz.:—

"Nor shall any such licensed person, directly or indirectly as aforesaid, permit, allow, or suffer any bowling alley, billiard or bagatelle table to be used, or any games or amusements of the like description to be played in such tavern or shop, or in or upon any premises connected therewith, during the time prohibited by the Liquor License Act, or by this resolution, for the sale of liquor therein.

"Any person or persons guilty of any infraction of any of the provisions of this resolution shall, upon conviction thereof before the Police Magistrate of the city of Toronto, forfeit and pay a penalty of twenty dollars and costs; and in default of payment thereof forthwith, the said Police Magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the offender; and in default of sufficient distress in that behalf, the said Police Magistrate shall by warrant commit the offender to the common gaol of the city of Toronto, with or without hard labour, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment be sooner paid."

The appellant was the holder of a retail license for his tavern, and had signed an undertaking as follows:—

"We, the undersigned holders of licenses for taverns and shops in the city of Toronto, respectively acknowledge that we have severally and respectively received a copy of the resolution of the License Commissioners of the city of Toronto to regulate taverns and shops, passed on the 25th day of April last, hereunto annexed, upon the several dates set opposite to our respective signatures hereunder written, and we severally and respectively promise,

undertake, and agree to observe and perform the conditions and provisions of such resolution.

"2nd May, Tavern. A. G. HODGE. (L.S.)"

He was also the holder of a billiard license for the city of Toronto to keep a billiard saloon with one table [128] for the year 1881, and, under it, had a billiard table in his tavern.

He did permit this billiard table to be used as such within the period prohibited by the resolution of the License Commissioners, and it was for that infraction of their rules he was prosecuted and convicted.

The preceding statement of the facts is sufficient to enable their Lordships to determine the questions raised on the appeal.

Mr. Kerr, Q.C., and Mr. Jeune, in their full and very able argument for the appellant, informed their Lordships that the first and principal question in the cause was whether "The Liquor License Act of 1877," in its 4th and 5th sections, was ultra vires of the Ontario Legislature, and properly said that it was a matter of importance as between the Dominion Parliament and the Legislature of the Province.

Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C. J., "that in all these questions of ultra vires it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget that in a previous decision on this same statute *(Citizens Insurance Company of Canada* v. *Parsons)* (1) their Lordships recommended that, "in performing the difficult duty of deter-

(1) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

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mining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand."

The appellants contended that the Legislature of Ontario had no power to pass any Act to regulate the liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the Provincial Legislature, by sect. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the Provincial Legislatures by sect. 92. The class in sect. 91 which the Liquor License Act, 1877, was [129] said to infringe was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell* v. *The Queen* (1) was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal.

The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order, and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several provinces of the Dominion, or to such parts of the provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority under sect. 91, unless the subject fell within some one or more

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

of the classes of subjects, which by sect. 92 were assigned exclusively to the Legislatures of the provinces.

It was in that case contended that the subject of the Temperance Act properly belonged to No. 13 of sect. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the Provincial Legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the appellant's counsel principally relied. These observations should be interpreted according to the subject matter to which they were intended to apply.

Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that,—

"Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada."

[130] And again :—

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law."

And their Lordships' reasons on that part of the case are thus concluded :—

"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to

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their Lordships for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-sect. 13."

It appears to their Lordships that *Russell* v. *The Queen*, (1) when properly understood, is not an authority in support of the appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the *Citizens' Insurance Company* (2) illustrate is, that subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

Their Lordships proceed now to consider the subject matter and legislative character of sects. 4 and 5 of "The Liquor License Act" of 1877, cap. 181, Revised Statutes of Ontario. That Act is so far confined in its operation to municipalities in the Province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass under the name of resolutions, what we know as by-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number [131] of licenses; for declaring that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of license inspectors, and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the province, and to be similar to, though

(1) 7 App. Cas. 829; *ante*, vol. 2, p. 12.
(2) 7 App. Cas. 96; *ante*, vol. 2, p. 265.

not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the Local Parliaments.

Their Lorships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted.

The subjects of legislation in the Ontario Act of 1877, sects. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of sect. 92 of British North America Statute, 1867.

Their Lordships are, therefore, of opinion that, in relation to sects. 4 and 5 of the Act in question, the Legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament.

Assuming that the Local Legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the Local Legislature to delegate those powers to the License Commissioners or any other persons. In other words, that the power conferred by the Imperial

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Parliament on the Local Legislature should be exercised [132] in full by that body, and by that body alone. The maxim, delegatus non potest delegare, was relied on.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a Legislature committing import-

ant regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for courts of law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolu-[133] tions are warranted, power to enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

Many other objections were raised on the part of the appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the resolutions were merely in the nature of municipal or police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses. But it was contended that the Provincial Legislature had no power to impose imprisonment or hard labour for breach of newly created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labour. It is not unworthy of observation that this point, as to the power to impose hard labour, was not raised on the rule nisi for the certiorari, nor is it to be found amongst the reasons against the appeal to the Appellate Court of Ontario (1).

(1) [The objection that a Provincial Legislature has not power to enforce its laws by imposing hard labour as a punishment was raised in the case of *Regina* v. *Frawley* (7 App. Rep. 246; *ante*, vol. 2, p. 576),

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It seems to have been either overlooked or advisedly omitted.

If, as their Lordships have decided, the subjects of legislation come within the powers of the Provincial Legislature, then No. 15 of section 92 of the British North America Act, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with No. 27 of section 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labour;" in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

The Provincial Legislature having thus the authority to impose imprisonment with or without hard labour, [134] had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

It is said, however, that the Legislature did not delegate such powers to the License Commissioners, and that therefore the resolution imposing hard labour is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by sect. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the

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argued in the Court of Appeal with the case of *Regina* v. *Hodge*. The Court of Appeal held that the Provincial Legislature could impose hard labour as a punishment. See Dominion Sessional Papers of 1884, Sessional Paper 30, p. 48.]

word "penalty" is well adapted to include imprisonment may be questioned, but in this Act it is so used, for sect. 52 imposes on offenders against the provisions of sect. 43 a penalty of 20 dollars or 15 days' imprisonment, and for a fourth offence a penalty of imprisonment with hard labour only. "Penalty" here seems to be used in its wider sense as equivalent to punishment. It is observable that in sect. 59, where recovery of penalties is dealt with, the Act speaks of "penalties in money." But, supposing that the "penalty" is to be confined to pecuniary penalties, those penalties may, by sect. 70, be recovered and enforced in the manner and to the extent, that by-laws of municipal councils may be enforced under the authority of the Municipal Act. The word "recover" is an apt word for pecuniary remedies, and the word "enforce" for remedies against the person.

Turning to the Municipal Act, we find that, by sect. 454, municipal councils may pass by-laws for inflicting reasonable fines and penalties for the breach of any by-laws, and for inflicting reasonable punishment by imprisonment, with or without hard labour, for the breach of any by-laws in case the fine cannot be recovered. By sects. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a Justice of the Peace, and that, where the prosecution is for an offence against a municipal by-law, the Justice may award the whole or such part of the penalty or punishment imposed by the by-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the Justice may commit the offender to prison for the term, or some part thereof, specified in the by-law. If these by-laws are to be en-
[135] forced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

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The Liquor License Act then gives to the Commissioners either power to impose a penalty against the person directly, or power to impose a money penalty, which, when imposed, may be enforced according to sects. 454 and 400-2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their by-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case, their resolution must, in order to give the magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred upon them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

JUDGMENTS IN ONTARIO COURT OF APPEAL.

[*Reported 7 App. Rep. 246.*]

SPRAGGE, C. J.:—

[251] The only question is upon the conviction of the defendant, who was licensed as a tavern-keeper in the city of Toronto, for allowing a billiard table to be used in his tavern after the hour of seven o'clock at night on Saturday, the 7th of May, 1881, in contravention of a resolution and enactment of the Board of License Commissioners of the city.

The selling of beer to a boy by the defendant is not in question.

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The reasons of the defendant against the conviction are: 1st, that the Legislature of Ontario had not power to enact such regulations as were enacted by the Board of Commissioners, and to create offences and annex penalties for their infraction; and, 2nd, that if the Legislature had such power, it could not delegate such power to the Board of Commissioners.

It was upon this second ground that the judgment of the Court of Queen's Bench, now appealed from, is rested.

I do not propose to attempt a definition of the powers conferred by the Imperial Parliament, by the B. N. A. Act, upon the Dominion Parliament and the Provincial Legislatures respectively. They each derive their powers from the same source; and the power to make laws in relation to the several classes of subjects, legislation upon which is, by the Imperial Act, committed exclusively to the Provincial Legislatures is as large and complete as it is in the classes of subjects committed by enumeration of subjects to the Dominion Parliament. The limits of the *subjects* of jurisdiction are prescribed; but within those limits the authority to legislate is not limited. I cannot do better than to quote here the language of Lord Selborne in *Regina* v. *Burah*, (1). Speaking of the Council of the Governor-General of India, upon which legislative powers were conferred by the Imperial Parliament, he says: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits [252] which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

Looking at the classes of subjects legislation upon which is committed exclusively to the Provinces, it is very apparent that it was intended that their Legislatures should possess very large and ample powers in relation to all subjects of a local and domestic nature. They had possessed plenary powers upon these subjects before confederation; and the general scheme of confederation appears to have been to leave to them the plenary control of these subjects. They were, under the Act, Legislatures in regard to these subjects in the true and full sense of the term. This is the more apparent from the use of the words "exclusive" and "exclusively," (and they are

(1) 3 App. Cas. 889, 904.

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used repeatedly) in the Imperial Act. Other legislation upon these classes of subjects is excluded. No alteration, no amendment, no perfecting of any measure falling within these classes of subjects, can be made by any authority outside of the Provincial Legislature. It is therefore necessary that the Provincial Legislature should possess plenary power in relation to all these subjects, to change, amend, repeal, re-enact, and in short to deal with them as change of circumstances or other exigencies might render proper; the propriety of changes in any shape made, not to be challenged by any other legislative authority, and the power to make them being limited only by the rule, whether the law making the change is within the class of subjects legislation upon which is assigned to Provincial Legislatures.

The B. N. A. Act confers a constitution; distributively as to powers of legislation; and with those powers necessarily all that was needful to make those powers effectual. This is well put by Mr. Cooley, in his work on Constitutional Limitations, 4th ed., p. 77: "The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its con- [253] struction. In regard to the Constitution of the United States, (which it will be remembered has limited and enumerated powers—Story's Constitution of United States, sec. 426), the rule has been laid down that where a general power is conferred, or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other, is also conferred. . . . Under every constitution implication must be resorted to, in order to carry out the general grants of power. A constitution cannot, from its very nature, enter into a minute specification of all the minor powers, naturally and obviously included in, and flowing from, the great and important ones which are expressly granted. It is therefore established, as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the enjoyment of the other."

We have the high authority of Vattel upon the same point. He says, Book 2, c. 17. ss. 285, 6: "The most important rule in cases of this nature is, that a constitution of government does not and cannot, from its nature, depend in any great degree upon mere verba criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stands well with the context and

subject-matter it must yield to the latter. While then we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe ; and as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects, and its general structure." (1)

One other consideration presents itself, which is, to my mind, conclusive. This matter of licensing and of the regulation of places and persons licensed pertains to municipal institutions, and is moreover of a local nature. Now, the making of laws in relation to both these subjects being committed exclusively to the Provincial Legis- [254] latures, and legislation by any other power being thereby excluded, it follows that the B. N. A. Act operates to withdraw from legislative control *by any power or body whatever* the licensing and the regulation of places and persons licensed ; powers in regard to which they had theretofore unquestionably exercised. The effect in that case would be more and other than a *distribution* of legislative power, it would be an *extinction* of legislative power in regard to subjects which, up to confederation, had been subjects of Provincial legislation.

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(1) [The passage here cited is from Story on the Constitution, sect. 455, but in a foot note Story refers to Vattel, Book 2, c. 17, ss. 285, 286— The sections of Vattel referred to are as follows]:

Sect. 285: "It frequently happens that with a view to conciseness, people express imperfectly, and with some degree of obscurity, things which they suppose to be sufficiently elucidated by the preceding matter, or which they intend to explain in the sequel: and moreover, words and expressions have a different force, sometimes even a quite different signification, according to the occasion, their connection and their relation to other words. The connection and train of the discourse is therefore another source of interpretation. *We must consider the whole discourse together, in order perfectly to conceive the sense of it, and to give to each expression, not so much the signification which it may individually admit of, as that which it ought to have from the context and spirit of the discourse* Such is the maxim of the Roman law, incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere.

Sect. 286: "The very connection and relation of the things in question helps also to discover and establish the true sense of a treaty, or of any other piece. *The interpretation ought to be made in such a manner that all the parts may appear consonant to each other,—that what follows may agree with what preceded,—unless it evidently appear, that, by the subsequent clauses the parties intended to make some alteration in the preceding ones.* For it is to be presumed that the authors of a deed had an uniform and steady train of thinking,—that they did not aim at inconsistencies and contradictions,—but rather that they intended to explain one thing by another,—and, in a word, that one and the same spirit reigns throughout the same production or the same treaty. . . . ."

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I will presently consider the question whether the imposing duties and conferring powers imposed by the Act of 1875-6 upon License Commissioners was a new delegation of authority not contemplated by the B. N. A. Act; but before doing so it will be well to consider this power to delegate, which is denied to the Provincial Legislature by the judgment of the Court of Queen's Bench. *Regina* v. *Burah* (1), is certainly no authority for the denial of such power. Lord Selborne gives his idea of the kind of power that cannot be delegated, when he says, at p. 905, that "the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils' Act." But no part of his judgment countenances the idea that a legislative body may not delegate to others authority to make rules, orders, by-laws, or whatever may be necessary to carry into effect the enactments of the Legislature itself. Sir James Stephen, in his argument in the *Burah Case* (1), gives several instances of what he calls conferred discretion, and delegation of authority. It would indeed be difficult to conceive any more decided instances of delegation of authority, and that quasi legislative authority, than is to be found in the last as well as previous Municipal Institutions' Acts passed by the Legislature of United Canada before confederation; and it is to be remembered that that Legislature had no more power to delegate power upon that subject of legislation, than had the Legislature of Ontario after confederation

[255] Besides the Municipal Institutions' Act, the Attorney-General in his argument gives us several instances of legislative delegation of authority by the Canadian Legislature before confederation. One is the authority given to the Governor-in-Council by sects. 9 and 10 of the Public Lands' Act, 23 Vict. c. 2; another is the authority given by the Grammar Schools' Act, 22 Vict. c. 63, to the Council of Public Instruction, to make rules and regulations for the organization and government of grammar schools; and there are besides the frequent instances of power delegated to the judiciary to make rules and orders of Court. I may instance the power delegated by 12 Vict. c. 64, to the Court of Chancery. After enumerating a number of subjects in respect of which this power is given, this general power is delegated, "to make such general orders from time to time as the Court may deem expedient in relation to every other matter deemed expedient,

(1) 3 App. Cas. 889.

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for better attaining the ends of justice and advancing the remedies of suitors ; with power from time to time to suspend, repeal, vary, or revive such orders ; " and the only restriction upon the power so conferred was, that no such order should have the effect of altering the principles or rules of decision of the Court. We know also that the Imperial Parliament has, from time to time, delegated large powers of the like nature to the judiciary ; and in the recent Judicature Acts, powers that are essentially legislative in their character.

My conclusion is, that it cannot be correctly laid down as a proposition of law that a Legislature cannot delegate its powers, to other bodies, or to boards of officers created by itself, in order to the carrying out its legislation upon particular subjects. It is not necessary to go further. It has been the course of legislation to do this in England, and in Canada ; and also in the neighbouring Republic, and it is manifest that a contrary doctrine would cripple legislation to a very serious extent.

It is important to bear in mind that the Imperial Parliament, in [256] committing to the Provincial Legislatures the making of laws in relation to municipal institutions, committed to them as a subject of legislation that which was as it then stood and had stood for a number of years, wholly a subject of delegated power from the general Legislature. The power was conferred in as broad and comprehensive terms as possible " to make laws in relation to." That necessarily imported ex vi termini power to change the laws in relation to that subject ; and as long as the changes made were changes only in municipal institutions they were within the power. In the then Province of Upper Canada at the date of confederation township councils, county councils, city councils, boards of police commissioners, were all parts of the machinery which, to take as an instance the county of York, constituted a municipal institution. Great changes might be made in all these pieces of machinery : their powers and duties might be changed ; some parts might be left out, *e. g.* township councils, or county councils, or boards of commissioners, as making the machinery too cumbrous or too complicated, or for any other reason ; and the powers and duties exercised by those left out might be committed to those remaining, or to some new boards or other pieces of machinery substituted for them. I cannot see how it could be ultra vires the Provincial Legislature to make all these changes provided they were changes only in relation to municipal institutions.

In the judgment of the Court below it is said : " Our Legislature

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has certainly delegated to the Board of License Commissioners the creation of certain new restrictions, and limitations on individual liberty of action. . . . It seems very difficult, in our judgment, to hold that the confederation Act gives any such power of delegating authority, first of creating a quasi offence, and then of punishing it by fine or imprisonment." If, in the passage first quoted it is meant (as I think it must be meant) that the Provincial Legislature of [257] Ontario has delegated to the Board of License Commissioners the power of creating new restrictions and limitations on individual liberty of action, not possessed, *i. e.*, the power not possessed, by component parts or a component part of municipal institutions, I am unable to assent to the proposition. A short review of the legislation on the subject as it stood at the date of confederation, and as it has been altered since, within the powers conferred by the confederation Act, will shew this.

By the Municipal Institutions' Act of the late Province of Canada, passed in 1866, and which applied to Upper Canada only, different provisions are made as to the licensing of taverns and shops, and the licensing of billiard tables. Power to make by-laws for the licensing of taverns (licenses to shops not being in question, I will confine myself to the licensing of taverns and of billiard tables) was conferred upon the councils of townships, towns, and incorporated villages, and in cities upon the commissioners of police, and for regulating the houses or places licensed; and power to make by-laws for licensing, regulating, and governing all persons keeping billiard tables for hire or gain, in a house or place of public entertainment or resort, was conferred upon councils of townships, cities, towns, and incorporated villages. And these powers in relation to billiard tables have remained unchanged in the same bodies.

Under the same Act, 1866, Municipal Councils had power to pass by-laws for inflicting reasonable fines and penalties, not exceeding $50, for breach of any of the by-laws of the corporation; and for reasonable punishment by imprisonment, with or without hard labour, for such breach in case of non-payment of fine and costs, and in the absence of means of distress.

So far, power was not given to police commissioners in cities to enforce the by-laws which they were authorized to make. They had the same power to make by-laws for the licensing and the regulation of taverns as the Municipal Councils had, but not the power to [258] make by-laws for enforcing their regulations; and the law stood thus until the Provincial Act of 1869, 32 Vict. c. 32, was

passed. This Act conferred upon commissioners of police in cities the same power of making by-laws to enforce their by-laws in relation to the licensing and regulation of taverns as was already possessed by the Municipal Councils. The Act did not confer upon the commissioners an unlimited right to name the punishment for infraction of their by-laws, but to attach penalties for their infraction in the same manner and to the extent that by-laws of city councils might be enforced under the Municipal Act of 1866; thus placing the commissioners of police in cities upon the same footing in all respects as regards the licensing and regulation of taverns as the councils of municipal bodies other than cities, as was evidently intended by the Act of 1866.

The Act of 1874, which related only to tavern and shop licenses, made no difference in this respect. It re-enacted in substance the provisions of the Act of 1866 as to the licensing and regulating of tavern and shop licenses, etc.; it made it a matter of legislative enactment that in all places where intoxicating liquors may be sold no sale or other disposal thereof should take place between 7 p. m. on Saturday and 6 a. m. on the following Monday; adding penalties for the infraction of this provision.

The Act of 1875-6, by which the Board of License Commissioners was constituted, transferred to that body all powers and duties conferred and imposed upon the commissioners of police and Municipal Councils, respectively, by the Act of 1874; and that body, on the 25th of April, 1881, by what it calls a resolution, enacted that no licensee of a tavern should inter alia, allow a billiard table to be used therein during the time prohibited by the Liquor License Act—the Act of 1875-6—or by the resolution then passed; and it is for allowing billiards to be played in contravention of this resolution or enactment that the defendant has been convicted.

[259] I do not myself entertain any doubt as to the power of the Provincial Legislature to make the change made by the Act of 1875-6 in the municipal law as it then stood. I think it is to be regarded as only a change in the machinery by which the municipal institutions of the Province had theretofore been worked; and as the power to make laws in relation to municipal institutions was conferred upon that Legislature by the confederation Act, it clearly, in my judgment, had the power to make that change.

If the change was intra vires the license commissioners had the same power to make by-laws in relation to the licensing of taverns, and in regard to "regulating" licensed taverns, as, under the Act

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of 1866 and the other Acts to which I have referred, was possessed by municipal councils and commissioners of police, respectively. I think it very clear, and I do not indeed understand it to be denied, that those bodies had power, under their authority to make by-laws for declaring the terms and conditions required to be complied with by licensees of taverns and for regulating licensed taverns, to prescribe hours during which the licensee should not permit billiards to be played in his tavern. There are a number of American cases upon the subject which are collected by Mr. Dillon in his work on Municipal Corporations, under the head: "Authority Delegated to Municipalities." I think it too clear to need the authority of decided cases. I will, however, refer to the judgment of Baron Martin in the *Attorney-General* v. *Radloff* (1); and to the judgment of our Court of Queen's Bench in *Regina* v. *Boardman* (2).

So far as to the delegation of power to create restrictions and limitations on individual liberty of action. The quasi offence created is the contravention of the regulations made by by-laws as to the hours during which games of billiards, bagatelle, and games of the like description may be played in taverns.

Then as to the delegation of power to boards of commissioners of police and the transference of that power to boards of license com-[260] missioners, to make by-laws for attaching penalties to the infraction of their by-laws in relation to the licensing and the regulation of taverns. I have already observed that the power conferred was limited to that already possessed by municipal councils. Still it must be conceded that it was the delegation of a power to impose fines to a limited amount; and in case of non-payment, and the absence of distress, to imprison for a limited period, *i. e.*, not exceeding twenty-one days; and the question is, whether this falls within the power conferred of making laws in relation to municipal institutions and clause 15 of sect. 92 of the confederation Act; and this appears to me the only point presenting any difficulty in the case.

Among the subjects in relation to which exclusive power to make laws is, by sect. 92 of the confederation Act, committed to the Provincial Legislatures is this, numbered 15: "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." What the Pro-

(1) 10 Ex. 84, 96. (2) 30 U. C. Q. B. 553; *ante* vol. 1, p. 676.

vincial Legislature enacted by sect. 38 of the Act of 1869 was in substance this : that licensees of taverns in cities should be punishable for breach of by-laws made by commissioners of police, in the manner and to the extent that they were punishable for breach of by-laws in respect of the same subject matter made by municipal councils. The commissioners, it is true, were authorized to make by-laws "attaching penalties for the infraction thereof," but that power was expressly limited to the power conferred upon other bodies having the same powers in regard to licensing. Suppose sect. 38 had been silent as to by-laws attaching penalties, and had enacted only that licensees of taverns in cities should be subject to the same punishment for breach of by-laws made by commissioners as licensees in other municipalities are subject to for breach of by-laws made by councils, would such an enactment be ultra vires? It was a *law of the Province* made in relation to municipal institutions, enacting that by-laws made by bodies which, at the date of confederation, were component parts of municipal institutions, and [261] with power to make these by-laws, should be enforced ; and enacting how they shall be enforced, viz.: in the manner and to the extent in which by-laws of councils may be enforced. It would be only enacting, in another shape, that licensees of taverns infringing these by-laws should be punishable by fine, etc., describing the punishment as in the Act of 1866. I cannot think that such an enactment would be ultra vires It would be within all the conditions of No. 15 of sect. 92. Is it then less a law of the Province that is enforced by this enactment because, in addition to limiting the punishment, it requires that it shall be defined by by law. That indeed is the real effect of the words used. The power of the police or other magistrate having cognizance of the offence would be larger in the infliction of punishment without the requirement that by-laws "to attach penalties" should be passed, for without such provision he would be limited only by the Act of 1866, while with that provision his power is limited both by the Act and the by-laws, as it is clear that the by-law could not attach penalties beyond those authorized by the Act. The conviction then, in such a case, would be for breach of a by-law deriving its authority from the Act of 1866, amended, within the power of the Legislature, by the Act of 1875-6 : and the conviction and punishment are, under the authority of the Act of 1869, for an offence against the provincial law of Ontario.

There is, moreover, this very important consideration, that if an infraction of tavern license by-laws made by Police Commissioners,

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and then subsequently by License Commissioners, cannot be made punishable by provincial legislation, they cannot be made punishable at all, for they are not infractions of any law other than the law of the Province ; and laws of the Province in relation to municipal institutions can only be enforced by the imposition of punishment under the authority of provincial legislation. My conclusion therefore upon both these points is, that the legislation of the Provincial Legislature was intra vires.

[262] It is, however, matter of surprise and regret that the city officials concerned in the information laid against the defendant, and its prosecution, should have prosecuted as for an offence against the resolution of the license commissioners, instead of prosecuting for an offence against the by-law of the city itself, in relation to the licensing and regulation of billiard tables. By the Municipal Institutions' Act of 1866, power was conferred upon the municipal councils of *cities* as well as other municipalities, to make by-laws for licensing, regulating, and governing all persons who, for hire or gain, keep billiard tables, or have a billiard table in a house or place of public entertainment or resort ; and for fixing the sum to be paid for such license. This power was renewed in the same terms in the Municipal Institutions' Act of Ontario 1873, and again in the R. S. O. c. 174.

Under the authority thus conferred, the municipal council of the city of Toronto passed by-law No, 477, printed in the appeal book, at pp. 6, 7, fixing the sums to be paid for licenses ; and making regulations in regard to the licensees and the use of their tables ; among others this, that every licensed billiard-room situate in any place of public entertainment or resort, shall be closed from and after the hour of seven on Saturday night, till the hour of six on Monday morning thereafter. And the conviction and the evidence upon which it was founded, both shew that every fact necessary to shew the defendant an offender against the by-law was proved ; and the penalty adjudged against the defendant was within the penalty authorized by the same statute for breach of by-laws of corporations.

If this plain and obvious course had been pursued, the only question that could have arisen would have been, whether the provisions of the Municipal Institutions' Act, in force in Upper Canada at the date of confederation have been abrogated, a question upon which I think no reasonable doubt can be entertained.

We are informed that this is a test case. If by this it is meant as a test whether the licensee of a tavern or other place of public enter-

tainment within the description contained in the Act of 1866, [263] and being also the licensee of a billiard table within the description contained in the same Act, is or is not liable to conviction for the act for which this defendant was convicted, I am prepared to say that I see no reason whatever for doubting that he is liable to such conviction.

Whatever doubt may exist as to *this* conviction is due to the untoward ingenuity displayed by the city officials in complicating the real substantial question between the city and the licensees of billiard tables, by the course adopted by them in the charge and the prosecution of the offence.

BURTON, J. A.:—

[272] The questions raised upon this appeal are of great general importance, involving as they do the power of the Provincial Legislature to pass enactments for enforcing their own laws by fine or imprisonment, or, assuming them to have the power, their authority to delegate it within certain limits to a Municipal Council or other local board.

The duty of deciding upon the validity or invalidity of an Act of the Dominion Parliament or Local Legislature by reason of their transcending the limits of their legislative power, is one which the Courts of this country were seldom called upon to consider before the passing of the B. N. A. Act, but questions of the kind have for many years been the subject of discussion and decision in the Courts of the United States, and we can scarcely do better than adopt the sound rule established in those Courts, when placing a judicial construction on constitutional provisions, which declares, that in case of doubt every possible presumption and intendment will be made in favour of the constitutionality of the Act in question, and that the Courts will only interfere in cases of clear and unquestionable violation of the fundamental law.

It must also not be lost sight of that the powers intended to be conferred upon the several Legislatures of the Dominion and the Provinces were necessarily expressed in very general terms, it being foreseen by the framers of the measure that it would be a perilous and difficult, if not impracticable task, to provide for minute specifications of their respective powers, or to declare the means by which they should be carried into execution.

The leading features of the scheme of confederation were that the Provinces should have full and exclusive control over their internal

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[273] affairs, and the power to make laws for the general order and good government of the Provinces, whilst the like power to make laws for the peace, order, and good government of the entire Dominion, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces, was given to the Dominion Legislature.

The powers so granted to the Provincial Legislatures are in some respects fully as important as those given to the Dominion, as for instance the exclusive power to deal with property and civil rights, the administration of justice, and the constitution of the Courts, whilst those granted to the Dominion are more national in their character, or, to cite the language of the Colonial Secretary in introducing the bill, "The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the Provinces, and at the same time to retain for each Province so ample a measure of municipal liberty and self-government as will allow and indeed compel them to exercise those local powers which they can exercise with great advantage to the community."

But as to each the Imperial Act was intended to define as accurately as could be done in a constitutional charter, their relative powers; all matters of a local and private nature, including those specially enumerated in sect. 92, being given to the Provincial Legislatures, and the remainder of the legislative powers necessary for the peace, order, and good government of the Dominion, including those specially mentioned in sect. 91, being considered as general powers, and entrusted to the Dominion Parliament.

The case of *Dobie* v. *The Temporalities Board* (1), recently decided in the Privy Council, is an illustration of this distinction. The Act there in question, passed by the Legislature of Quebec, professed to deal with a single statutory trust, and interfered directly with the constitution and privileges of a corporation created by an Act of the [274] late Province of Canada, and having its corporate existence and corporate rights in the Province of Ontario as well as in the Province of Quebec.

It clearly did not fall within any of the classes of subjects enumerated in sect. 92, it was not a matter of a local or private nature, and could therefore only be dealt with by the Dominion Parliament.

(1) 7 App. Cas. 136; *ante*, vol. 1, p. 351.

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Within its range then each has an exclusive power ; the only case in which a concurrent power is given is in sect. 95, to make laws in relation to agriculture and immigration, and there it is specially provided that the Provincial legislation may be overridden by the Dominion Parliament.

But there are cases in which the power is given generally to the Provinces to deal with a particular subject. Take for instance property and civil rights, which in those general terms would comprise the power to regulate contracts of every kind, including bills of exchange and promissory notes. When therefore we find the Dominion entrusted with the exclusive power to legislate upon bills and notes, the only way to make the Act consistent is to read this as an exception to the general power granted to the Province. So again, although the Provinces have exclusive power under sub-sect. 14 to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, when we find bankruptcy and insolvency mentioned as a subject for the exclusive legislation of the Dominion we must necessarily understand that the organization of an Insolvent Court, and administration of justice and proceedings connected with insolvency, are excepted from the general words of that sub-section.

But to that extent only can the Dominion Parliament assume to interfere. Reading the powers granted in sect. 92, with the exceptions where they occur in sect. 91, the Local Legislature is absolute and supreme over those subject matters with as ample power to legislate in respect of them as the Imperial Parliament, and without any possibility of interference by the Dominion Legislature.

[275] Adopting the same rule of construction, sub-sect. 15 of sect. 92, must, in my opinion, be read as an exception or modification of sub-sect. 27 of sect. 91, which vests in the Dominion Parliament the power to deal generally with the criminal law.

The powers claimed to be exercised by the Provincial Legislature in the present case must depend upon the construction to be placed on sub-sects. 8, 13 and 16, of sect. 92, for I agree with the learned Chief Justice that a right to license an employment does not imply a right to charge a license fee therefor, with a view to revenue, unless such seems to be the manifest purpose of the power. The right to restrict parties by requiring a license must be sought for under the sections I have referred to, and not under sub-sect. 9, which was passed not for the purpose of conferring the power to

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issue licenses, but to enable the Provinces by that means to raise a revenue for provincial, local, or municipal purposes. The only power of taxation given by sub-sect. 2, is that of direct taxation. Sub-sect. 9 was intended to allow them in this particular mode to raise a revenue by indirect taxation.

The other sections vest in them the power to make laws in relation to municipal institutions, property and civil rights, the imposition of punishment in the manner specified for enforcing any law of the Province made in reference to any of the classes of subjects under sect. 92, and the general power as to all matters of a merely local or private nature in the Province.

At the time of confederation the Municipal Institutions' Act of 1866 was in force, and under it the municipal councils were empowered to pass by-laws and to fix the punishment within certain defined limits for their infraction. To the police commissioners had been transferred a power formerly vested in the council to pass by-laws regulating taverns, and to prohibit the sale of liquors without license, but no power was given at that time to the commissioners to enforce the performance of these by-laws by fine or otherwise, and by sect. 129 of the B. N. A. Act, this law was continued in force until repealed [276] or altered by the appropriate Legislature.

It was at that time dealt with by the Parliament of the Province of Canada as coming within what were known as municipal institutions, the power of dealing with which is now within the exclusive jurisdiction of the Provinces ; and it would certainly come within the general clause which confers exclusive power on the Provincial Legislature to deal with matters of a merely local or private nature, and does not fall within any of the subjects with which the Dominion Parliament has power to deal, unless, perhaps, by a general measure affecting the whole Dominion, which has not been done.

We accordingly find the Local Legislature dealing with it in 1869, and giving power to the commissioners to attach penalties for the infraction of their by-laws in the manner and to the extent that by-laws of the City Council might be enforced under the Municipal Act of 1866. And the same powers and duties have, as the learned Chief Justice has pointed out, been transferred to the Board of License Commissioners.

Before dealing with the question of delegation, can it be supposed for a moment that the Imperial Parliament intended to confer upon the Local Legislatures power to pass laws without the means of enforcing them ; and yet it was gravely urged in argument that the

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right to enforce them by imprisonment would in each case depend upon the will or action of the Dominion Parliament.

Every government which is supreme must have the capacity to make its own commands obeyed. The Provincial Legislatures, as I have shewn, within their respective spheres, are absolutely supreme. It follows that wherever the Provincial Legislatures have power to enact any particular measure, wherever they may require anything to be done or forborne in carrying out the powers granted to them by the Imperial Parliament, they must have of necessity the power to enforce, and we should not look for any express power but for [277] the fact that the criminal law generally is given to the Dominion. Hence it became necessary to give express and exclusive power to the Provincial Legislatures to declare acts of disobedience or acts which have a tendency to interfere with the proposed measures to be crimes, and affix such punishments as it deemed proper.

I incline to agree with the learned counsel for the defendant that the offence here charged comes within the definition of a crime, which has been said to be "an act of disobedience to a law forbidden under pain of punishment;" (1) but it does not follow that it must or can be dealt with by the Dominion Parliament.

As I have already pointed out, the statute has to be construed as a whole, and where some specific matters are mentioned as within the exclusive power of one body, which but for that reference would fall within the more general description of a subject matter confided to the other, the statute must be read as excepting it from that general description.

If, therefore, it be a crime, the power to punish it is expressly excepted from the general power over the criminal law given to the Dominion, and vested exclusively in the Province, if it is not a crime cadit quæstio.

I come to the conclusion that the Provincial Legislature, and the Provincial Legislature alone, has the power to pass laws for the infliction of penalties or imprisonment for the enforcement of a law of the Province in relation to a matter coming with a class of subjects with which alone the Province has the right to deal.

Having this power had they a right to delegate it as they have done to this Board of Commissioners? The learned Chief Justice of the Queen's Bench says: "Such a delegation was of course unobjectionable when done by a Legislature of unlimited authority in

(1) Harris' Principles of the Criminal Law, p. 1, citing from Sir J. Fitz-James Stephens' work.

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both criminal and civil proceedings," meaning thereby the Legislature of the old Province of Canada.

[278] It appears to me that if this be sound law, and I think it is, it furnishes a solution of the question.

It would seem almost a misapplication of terms to refer to the Provincial Legislature as exercising a delegated authority in the sense of being an agent or delegate of the Imperial Parliament. The Imperial Parliament has the power, no doubt, to pass laws such as those passed by the Local Legislature and affecting all Her Majesty's subjects in the Province, but it is equally clear that it is a power existing in name only, and one which it would never attempt to exercise, and therefore the Parliament of the Province cannot in that sense be spoken of as exercising a delegated authority.

It is true that Parliament gave both to the Dominion and to the Provinces the constitutions under which we live; both limited in extent, but both giving representative institutions, and giving to the Legislatures elected in the manner therein pointed out, plenary powers of legislation within their respective spheres as large and ample as those of the Imperial Parliament itself. The Legislatures so elected have a delegated authority it is true, but it is of the same character as that of the Imperial Parliament, who are collectively the delegates of the whole people.

If these are powers which the Imperial Parliament could have delegated, then they can equally be so delegated by the Legislature of our own Province; if not, then it is unnecessary to add that they cannot be so dealt with by a Provincial Legislature.

I take the case of *Regina* v. *Burah* (1), referred to in the Chief Justice's judgment, to be clear authority for this; but it is not conclusive as to this being a delegation of power which would be within the power of the Imperial Parliament.

In the celebrated case of the *Attorney-General* v. *Sillem* (*the Alexandra Case*), (2), this question was much discussed, and although there was a difference of opinion among the Judges, some of them holding that the power was not given by the statute to make the rule [279] in question, none of them appeared to entertain any doubt as to the right of Parliament so to delegate its authority. Referring to the objection, the late Mr. Justice Willes, at p. 609, says: "I think that must fail in the mind of anyone who considers the numerous instances of a similar delegation within the experience of us all. The

(1) 3 App. Cas. 889. (2) 2 H. & C. 431.

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course of pleading, for instance, in the Courts which I may call Courts of first instance, was always considered to be as much a part of the law of the land as any substantive rule for determining a right of property, or any other right; and it was always held that such a law could not be changed without the authority of Parliament, and yet the noble and learned framer of the Act, known as Parke's Act, the 3 & 4 Wm. 4, c. 42, conferred upon the Judges the power, in effect, of legislating with respect to such a portion of the law of the land. It is true that the power given in that Act was subject to the rules being laid for a certain period before Parliament. But inasmuch as Parliament, without the Crown, could not make a law—inasmuch as Parliament, constitutionally, could not give its assent to an Act of Parliament, simply by having the paper upon which the bill was written or printed laid before it, and inasmuch as in form and substance the assent of the Crown could only be given when both houses of Parliament were present, in effect the power of legislating was given to the Judges with respect to such portion of the law. . . . . Now, after referring to such an instance as that, one is almost ashamed to refer to the numerous cases in which towns and other local communities are allowed to determine by the voice of a majority whether certain Acts of Parliament for local government shall or shall not have power within the limits in which the inhabitants reside, and to make amends for referring to such an instance, I shall content myself for a proof that the delegation of legislative power is no objection, with referring to the 228th section of the Common Law Procedure Act of 1852, by which Her Majesty in Council was authorized to direct that all or any part of that Act of Parliament, making very great changes indeed in the law, should apply to all or any Court or Courts of Record in England or Wales, and that without any authority of the House of Lords or the House of Commons."

I wish to add that I fail to see any grounds for a distinction in this respect between the powers of a Parliament or Legislature acting under the constitution given to us by the B. N. A. Act and those conferred under the constitutional Acts of 1791 and 1840, and numerous cases are to be found in which those Legislatures delegated their authority.

In my opinion the judgment should be reversed, and this appeal allowed.

PATTERSON and MORRISON, JJ.A., concurred.

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JUDGMENT IN THE ONTARIO COURT OF QUEEN'S BENCH.

[*Reported 46 U. C. Q. B. 141.*]

Q.B., Ontario. HAGARTY, C. J. :—

Hagarty, C.J. [145] It was stated to us that the parties desired to present directly to the Court a very important question whether the Local Legislature, assuming that it had the power themselves to make these regulations and create these offences and annex penalties for their infraction, could delegate such powers to a Board of Commissioners, or any other authority outside their own legislative body.

The R. S. O. c. 181, sect. 3, appoints a Board of License Commissioners of three persons.

Sect. 4. "The License Commissioners may at any time before the 1st day of May in each year, pass a resolution or resolutions for regulating," etc.

[146] (1.) "For defining the conditions and qualifications requisite to obtain tavern licenses," etc.

(2.) "For limiting the number of tavern and shop licenses," etc.

(3.) On the same subject.

(4.) "For regulating the taverns and shops to be licensed."

(5.) "For fixing, etc., the duties, powers and privileges of the Inspector of Licenses," etc.

Sect. 5. "In and by any such resolution of a Board of License Commissioners the said Board may impose penalties for the infraction thereof."

Sect. 70. "In all cases where the Board of License Commissioners in cities passes a resolution in pursuance of the powers conferred upon them by the fourth and fifth sections of this Act, and in and by any such resolution, penalties are imposed for the infraction thereof, such penalties may be recovered and enforced by summary proceedings before the Police Magistrate, etc., in the manner and to the extent that by-laws of municipal councils may be enforced under the authority of 'The Municipal Act,' and the convictions in such proceedings may be in the form set forth in sect. 407 of the said last mentioned Act."

37 Vict. c. 32 (1874) sect. 9, O., allowed the Commissioners of Police in cities to pass by-laws much to the same effect as the revised Act allows. Sect. 48 gives them power by such by-laws to attach penalties recoverable before police magistrates to the same extent

that by-laws of city councils might be enforced under the Municipal Act.

At the time of confederation the law appears to have been under the Act of Canada, 1866 : 29 & 30 Vict. c. 51.

By sect. 249 the Commissioners of Police in cities might pass by-laws for granting tavern licenses, and by sub-sect. 2 for declaring the terms and conditions required to be complied with by applicants, and the security to be given for observing the same.

By sub-sect. 6, for regulating the houses or places licensed.

By sect. 262, the same body by by-law could appoint License Inspectors, and define their duties.

[147] Sect. 284 empowered the city council to pass by-laws to prevent the sale or gift of liquor to a child, apprentice, or servant, without the consent of a parent or master, etc.

The statute contains direct provisions and penalties for breach of its several provisions respecting taverns, as in sects. 254 to 260. We find no power given by the Act to any other body to create any new offence as to keeping a tavern.

Sect. 246 allows the council to pass by-laws (sub-sect. 6) for inflicting reasonable limited penalties or fines (inter alia) for breach of any of the by-laws of the corporation ; and (sub-sect. 8) for limited imprisonment for breach of any of the by-laws of the council, where the fine is not paid, "except for breach of any by-law or by-laws in cities, and the suppression of houses of ill-fame, for which the imprisonment may be for any period not exceeding six months," etc.

This Act was amended in the first session of Ontario, 31 Vict. c. 30. In the next session an Act was passed as to tavern licenses, 32 Vict. c. 32.

By sect. 6 the Commissioners of Police in cities might pass by-laws as to issuing of licenses, etc. ; and by sub-sect. 2 the terms and conditions to be observed by applicants were declared. Sub-sect. 6 regulated the houses or places to be licensed.

Numerous provisions are contained in the Act to be observed, and penalties provided for their infraction.

Sect. 38 allows the Police Commissioners, when authorized under this or any other Act or law, to make by-laws. They shall have power by such by-laws to attach penalties for the infraction thereof, to be recovered summarily, and in the manner and to the extent that by-laws of city councils might be enforced under the Municipal Act of 1866.

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This seems to be the first legislation empowering a Board to attach penalties to their by-laws as to taverns, apart from the powers given to Municipal Councils.

There was another amendment by 33 Vict. c. 28, not affecting this question.

[148] The license law is further amended by fresh provisions and penalties being enacted, 36 Vict. c. 34, sect. 8, directing the Police Commissioners to appoint an officer for the observance and enforcement of any by-law of the municipality with respect to tavern and shop licenses.

The Consolidated Municipal Act of 1873, sect. 337, repeats the already quoted provision of the Act 32 Vict. c. 32, sect. 38, as to the Board of Commissioners attaching penalties for the infraction of their by-laws.

The Act of 1874 professes to consolidate the Acts as to tavern licenses, and 37 Vict. c. 32, sect. 48, repeats the same clause just cited.

39 Vict. c. 26, sect. 1, 1875, declares that all powers and duties conferred on Commissioners of Police and Municipal Councils by the 37 Vict. c. 32, shall hereafter exclusively belong to and be exercised by a Board of License Commissioners of three persons, to be appointed by the Lieutenant-Governor in Council.

40 Vict. c. 18 makes additional provisions as to the License Inspectors and the general regulations of taverns.

The next legislation is under the R. S. O. c. 181, already cited, in effect substituting the Board of License Inspectors for the Board of Police Commissioners, under the 37 Vict. c. 32.

An Act of last session, 44 Vict. c. 27, sect. 17, allows an appeal from any judgment, quashing a conviction under R. S. O. c. 181, in the option of the Attorney-General.

It is conceded that these convictions are for the breach of certain provisions contained in these resolutions, and rest wholly on them as creating the liability to penalty and to punishment, and that such penalty, etc., is wholly the creation of such resolutions. We are thus brought in face of a very serious question, viz., the power of the Ontario Legislature to vest in the License Board the power of creating new offences, and annexing penalties for their commission.

Down to the date of confederation we find no such powers given to [149] any such Board. Large powers were delegated to municipal councils to pass by-laws for various specified objects, and to annex fines to a named limit, and penalties of imprisonment for a limited

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period for the nonpayment of such penalties. Such a delegation was of course unobjectionable when done by a Legislature of unlimited authority in both criminal and civil proceedings.

The B. N. A. Act completely re-arranged our constitution and established the Dominion and Provincial Governments with defined powers and duties.

The criminal law and procedure in criminal matters are reserved for Parliament.

In each Province the Legislature may exclusively make laws in relation to certain specified matters. Amongst them are Municipal Institutions, Shop, Tavern, Auctioneers' and other licenses, in order to the raising of a revenue, etc.

"The Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts," is provided for.

"The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section (92);" and "generally all matters of a merely local or private nature in the Province."

It seems reasonably clear that all legislative powers throughout the Dominion rest wholly on this Federation Act—the work of the Imperial Parliament, having unquestioned jurisdiction over the Empire of which we form a part.

In *Leprohon* v. *The Corporation of the City of Ottawa* (1) I had occasion, with the other Judges in Appeal, to discuss the relative positions of the Dominion and Provincial Legislatures.

The subject is fully discussed in the Supreme Court, in such cases as *The City of Fredericton* v. *The Queen* (2); *Valin* v. *Langlois* (3); [150] *Severn* v. *The Queen* (4); *Citizens' Ins. Co.* v. *Parsons* (5).

As we are obliged to hold that our Legislature is not acting under an original jurisdiction, but under the special authority given to it by the Confederation Act, we have to decide now whether this special power has been exercised, or some larger power endeavoured to be exercised beyond the grant.

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(1) 2 App. Rep. 522; *ante*, vol. 1, p. 592.

(2) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.

(3) 3 Can. S. C. R. 1; *ante*, vol. 1, p. 158.

(4) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.

(5) 4 Can. S. C. R. 215: *ante*, vol. 1, p. 284.

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Our Legislature has certainly delegated to the Board of License Commissioners the creation of certain new restrictions and limitations on individual liberty of action.

In *Regina* v. *Burah* (1) Lord Selborne, at p. 904, says: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

This was in reference to an Act of the Indian Legislature, which excludes the jurisdiction of the High Court within certain districts, which was held not to be inconsistent with the Indian High Court Act (Imperial). The 9th sect. of the Indian Act conferred upon the Lieutenant-Governor of Bengal the power to determine whether the Act or any part of it should be applied to a certain district. This was held to be conditional legislation, and not a delegation of legislative power.

Lord Selborne says, at p. 905, it leaves "to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, 'in the other territories subject to his government.' . . . .

"The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to [151] legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient."

The distinctions here pointed out are very intelligible. Naming an official to fix the time for the operation of a law to commence, or

(1) 3 App. Cas. 889.

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the area over which it was to extend, must be a very different matter from appointing an official to declare what shall be the law, and what punishment shall be appointed for its infraction. Conditional legislation and a delegation of power to another body must always be very distinguishable.

Assuming that the Legislature can themselves impose these restrictions, and annex to their violations these penalties, can they delegate their power, exerciseable in their discretion, to the discretion of any person or number of persons outside their assembly?

In the words of the B. N. A. Act, has this defendant, by disobeying the resolutions of the License Board, broken "any law of the Province?" He has offended against the regulations by the board established for the city of Toronto. The eight or nine cities of Ontario may thus have as many widely differing local regulations as to taverns. The Legislature has not enacted any of them, but has merely authorized each board in its discretion to make them.

It seems very difficult, in our judgment, to hold that the Confederation Act gives any such power of delegating authority, first, of creating a quasi offence, and then of punishing it by fine or imprisonment. We think it is a power that must be exercised by the Legislature alone.

In all these questions of ultra vires we consider it our wisest course not to widen the discussion by considerations not necessarily [152] involved in the decision of the point in controversy.

We, therefore, enter into no general consideration of the powers of the Legislature to legislate on this subject, but assuming their right so to do, we feel constrained to hold that they cannot devolve or delegate their powers to the discretion of a local board of commissioners.

We think the defendant has the right to say that he has not offended against "any law of the Province," and that the convictions cannot be supported.

We perceive that, by the Act of last Session, special power is given to the Attorney-General to appeal, if he think proper, against our decision.

ARMOUR and CAMERON, JJ., concurred.

[See *Powell* v. *Apollo Candle Company*, 10 App. Cas. 282, where Sir Robert P. Collier, delivering the judgment of the Judicial Committee of the Privy Council, after commenting on *Reg.* v. *Burah*, 3 App. Cas. 889, and *Hodge* v. *The Queen*, supra, says (p. 290): "These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."]

PRIVY COUNCIL.

THE ATTORNEY-GENERAL FOR QUEBEC .... *Appellant;*

AND

WALTER REED ..... *Respondent.*

On appeal from the Supreme Court of Canada.

[*Reported* 10 *App. Cas.* 141.]

B.N.A. Act, 1867, *ss.* 65, 92, *sub-ss.* 2, 14—*Quebec Act*, 43 & 44, *Vict. c.* 9—*Powers of Provincial Legislature—Duty upon Exhibits.*

Held, That Quebec Act (43 & 44 Vict. c. 9) which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein, is *ultra vires* of the Provincial Legislature.

Appeal from an order of the Supreme Court (June 18, 1883), (1) reversing a judgment of the Court of Queen's Bench of Quebec (Nov. 24, 1882), (2) and restoring a judgment of the Superior Court of Quebec, district of Montreal (March 10, 1882). (3)

The order declared that a certain duty of ten cents imposed by an Act of the Quebec Legislature, (43 & 44 Vict. c. 9) on every exhibit produced in Court in any action depending therein was not warranted by law, the Act imposing it being *ultra vires* of the Provincial Legislature.

The question arose in an action depending in the said Superior Court, wherein the respondent tendered a promissory note as an exhibit, and the prothonotary refused

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Present: THE LORD CHANCELLOR (EARL OF SELBORNE), LORD FITZGERALD, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 8 Can. S. C. R. 408; *post*, p. 196. (2) *Post*, p. 212.

(3) *Post*, p. 226.

to receive and file it, unless there were affixed to it a law stamp of ten cents in payment of the duty imposed by the said Act. A rule was thereupon obtained by the respondent and served by order of the Court upon the appellant to shew cause why the exhibit should not be received without a stamp; with the result as stated above. The judgment of the Supreme Court was pronounced by a majority of the Judges (Ritchie, C. J., Fournier, Henry and Gwynne, JJ., Strong and Taschereau, JJ., dissenting).

Davey, Q.C., and *Globensky*, Q.C. (of the Canadian bar), [142] *Pollard* with them, for the appellant, contended that the Act in question was within the competence of the Provincial Legislature. It was passed several years ago, duly received the assent prescribed by the imperial Act in lieu of the former royal assent to Acts of the former Province, was never disallowed, and was acted upon. The duty imposed was not a fresh one, but was identical with the duty of ten cents upon exhibits imposed by the Act 39 Vict. c. 8, which was only repealed and re-enacted by the Act in question. Its validity appears from the following considerations: (a) as imposing "direct taxation" in pursuance of the express power given to the Provincial Legislatures by the B. N. A. Act, 1867, sect. 92, sub-s. 2; (b) as relating to the administration of justice in the Provinces, under sub-s. 14 of the same section, within the meaning of the words there employed; (c) as being under the provisions of sects. 65 and 129, an alteration of a law in force in the former Province of Canada at the union of the Provinces into the Dominion by the said Act of 1867. In reference to this last reason for the validity of the Act, it was contended that up to and at the union Con. Stat. of Lower Canada, c. 109, s. 32, gave power to the Governor to impose any duty on exhibits in any Court in Lower Canada by Order in Council; that

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sect. 65 of the Act of 1867 (compare also sect. 129) made such power exerciseable by the Lieutenant-Governor of the Province, subject to the Legislature of the Province; that therefore Quebec Act, 39 Vict. c. 8, sects. 1 and 2, was within the competence of the Provincial Legislature; and that consequently the Act in question as a mere amendment or re-enactment of 39 Vict. c. 8, was equally within that competence.

The respondent did not appear.

The judgment of their Lordships was delivered by

EARL OF SELBORNE, L.C.:—

Their Lordships have considered the argument which they have heard, and they have come to the conclusion that the judgment appealed from must be affirmed.

The points to be considered are three: first of all, can [143] this charge upon exhibits used in the courts of justice of the Province be justified under the 2nd sub-sect. of clause 92 of the B. N. A. Act? Is it a case of direct taxation within the Province "in order to the raising of a revenue for provincial purposes?" What is the meaning of the words "direct taxation?"

Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated, more or less scientifically, such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill and those who agree with him is less unfavourable to the appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation, as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political

economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; [144] and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The Legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon any one else. Therefore it cannot be a tax demanded "from the very persons who it intended or desired should pay it," for in truth that is a matter of absolute indifference to the intention of the Legislature. And, on

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the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified, and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment, and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd sect. of the 92nd clause of the Act in question, still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under sub-s. 14. One of the things which are to be within the powers of the Provincial Legislatures—within their exclusive powers—is the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, and including the procedure in civil matters in the Courts. Now it is not [145] necessary for their Lordships to determine whether, if a special fund had been created by a Provincial Act for the maintenance of the administration of Justice in

the Provincial Courts, raised for that purpose, appropriated to that purpose and not available as general revenue for general Provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the Province; it does not provide in any way, directly or indirectly, for the maintenance of the Provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the Provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the 2nd sub-section; it is made part of the general consolidated revenue of the Province. It, therefore, is precisely within the words "taxation in order to the raising of a revenue for Provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general Provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general Provincial revenue.

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.

With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council, to do certain things not there specified. That, however, was subject to a power of abolition or alteration by the respective Legislatures of Ontario and Quebec with the exception, of course, of what depended on Imperial Legislation. Whatever powers of that kind existed,

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the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts, [146] not for the general revenue purposes of the Province, but for the purpose of forming a special fund, called "the Building and Jury fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury fund. It is a Legislative Act without any reference whatever to those powers if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax for the general purposes of the Province, and in aid of the general revenue, these legal proceedings.

It appears to their Lordships that, unless it can be justified under the 92nd section of the B. N. A. Act, it cannot be justified under the 65th.

Their Lordships must, therefore, humbly advise Her Majesty to dismiss this appeal.

JUDGMENTS IN SUPREME COURT OF CANADA.

[*Reported* 8 *Can. S. C. R.* 408.]

RITCHIE, C. J. :—

[415] In 1875, the Legislature of the Province of Quebec, by the Act 39 Vict. c. 8, for the first time imposed a tax of ten cents on the filing of every exhibit in a cause. This tax, payable by means of stamps, was to form part of the consolidated revenue of the Province of Quebec (sects. 1 and 2).

This Act was repealed by the 43rd & 44th Vict. c. 9, and the same tax of ten cents on filing of exhibits was re-imposed (sect. 9).

Although this Act does n t expressly declare that this tax shall form part of the consolidated revenue of the Province, as the repealed statute (39th Vict. c. 8) did, yet it enacts that all the duties therein mentioned shall be deemed payable to the Crown (sect. 3, sub-sect. 2), and they necessarily fall under the provision of 31st Vict. c. 9, sect. 3, which declares that all revenue whatever over which the Legislature of the Province has power of appropriation, shall form one consolidated fund to be appropriated for the public service of the Province.

This special tax has, therefore, been imposed since the B. N. A. [416] Act by the Legislature of the Province of Quebec, to form part of the cons olidated revenue of the Province. By the B. N. A. Act, 1867, sect. 92, sub-sect. 2, the Legislature of each Province is authorized to raise a revenue for Provincial purposes by means of direct taxation, and from the other sources, such as those mentioned in sub-sects. 5, 10 and 15, which have no application to the present case.

To the Dominion Parliament is given the right to raise money by any mode or system of taxation (sect. 91, sub-sect. 3). This right is exclusive when not coming within the classes of subjects assigned to the Provincial Legislatures, and as the Legislatures of the Provinces are only authorized to raise a revenue by direct taxation and the other sources of revenue already mentioned, it follows that the Parliament of Canada has the exclusive right to raise a revenue by means of indirect taxes, and the Legislatures of the Provinces have no such right.

The terms of the Act seem clear on this point, and the Judicial Committee of the Privy Council have so interpreted them by deciding in the case of the *Attorney-General for Quebec* v. *The Queen Insurance Company* (1), that the tax imposed on insurance comp nies by the Act 39th Vict. c. 7, of the Legislature of the Province of Quebec, was *ultra vires*, as not being a direct tax.

The 43rd & 44th Vict. c. 9, is clearly a tax Act to raise a revenue for Provincial purposes, and, therefore, the only question is—is this a direct or indirect tax?

Stamp duties were introduced into England in 1671 by a statute entitled "An Act for laying impositions on proceedings at law," for nine years—continued for three years, then expired—revived in 1693, and have always been considered indirect taxes.

(1) 3 App. Cas. 1090; *ante*, vol. 1., p. 117.

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This, in my opinion, is clearly an indirect tax levied for no specific purpose, but forms part of the consolidated revenue of the Province [417] for general purposes. The judgments of Mackay, J., and Dorion, C. J., are, to my mind, conclusive.

Had this been merely an easy means adopted for the purpose of collecting a fee of office for work actually performed, I might, as at present advised, be disposed to look on the matter in a very different light from what it now strikes me, but this is not a fee or reward for labour; but it is a tax for raising a revenue, pure and simple, and has no more to do with the officer who files the paper or with the maintenance of the administration of justice than any other tax or source of revenue of which the consolidated revenue of the Province is composed for the support of the Government, and to promote the general interests of the people.

I am of opinion the appeal should be allowed, and the judgment of the Superior Court affirmed.

STRONG, J. :—

The question presented for our decision by this appeal requires us to determine whether the 9th section of the Act 43 & 44 Vict. c. 9, was within the powers of the Legislature of the Province of Quebec. That section is in these words:

"There shall be imposed, levied and collected a duty of ten cents on every writ of summons issued out of any County Circuit Court, Magistrate's Court, or Commissioner's Court in the Province, and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars, and exhibit whatsoever, produced and filed before the Superior Court, the Circuit Court, or the Magistrate's Court, such duties payable in stamps."

A former statute, the 39th Vict. c. 8, had imposed a similar tax of ten cents for every exhibit filed in a cause. This Act was repealed, and its provisions re-enacted and consolidated with other like provisions by the statute now in question, 43 & 44 Vict. c. 9.

It has been argued that this was a direct tax which the Legislature [418] had power to impose under sub-sect. 2 of sect. 92 of the B. N. A. Act. I am, however, clearly of opinion that this contention must fail. Taxes on legal proceedings are invariably classed by scientific writers on taxation and political economy as indirect, and even though such a tax may not be indirect in the sense that the burthen of it is ultimately to be borne by a person other than he who originally pays it, it is clearly so, according to the well-founded

definition of Mr. McCulloch (1), who thus distinguishes direct and indirect taxes:

"A tax (he says) may be either direct or indirect; it is said to be *direct* when it is taken directly from property or income, and *indirect* when it is taken from them by making individuals pay for liberty to use certain articles or exercise certain privileges."

Subjected to this test, which has the sanction of a great number of similar authorities, it is apparent that the tax in question must be classed amongst indirect taxes.

The decision of the Privy Council in the case of the *Attorney-General for Quebec* v. *The Queen Insurance Company* (2) is also conclusively in favour of this view.

It is there said that there is nothing in the B. N. A. Act prohibiting Provincial Legislatures from imposing indirect taxes; that all that sub-sect. 2 of sect. 92 does, is to confer on the Provincial Legislatures exclusive powers to impose direct taxes, and that it does not follow that the Legislatures may not have implied powers of indirect taxation.

To say that the Provincial Legislatures have power of indirect taxation, either generally, as an inherent power without reference to any authority derived from the B. N. A. Act, or as implied from the powers expressly conferred upon them, is to assume that they have, to some extent, concurrent powers with Parliament, and that [419] their powers of legislation are not limited by the subjects particularly enumerated in sect. 92. In other words, that, whilst sect. 92 gives certain exclusive powers, it does not restrict Provincial Legislatures to those subjects. This important question was referred to, but not decided, in the case of *L'Union St. Jacques* v. *Belisle* (3), in the Privy Council. I do not think, however, we are called upon to consider it for the purposes of this appeal, for assuming that no such power exists, and that the legislation now impugned cannot be referred either to any concurrent authority to impose indirect taxes, or to a power of taxing incidental to the express authority to legislate on the subjects comprised in sub-sects. 14 and 16 of sect. 92, it appears to me that, under other provisions of the B. N. A. Act, and apart altogether from those contained in sect. 92, the imposition of this stamp duty on exhibits was not *ultra vires*.

By cap. 109 of the Consolidated Statutes of Lower Canada, which

(1) McCulloch on Taxation, p. 1. (2) 3 App. Cas. 1090; *ante*, vol. 1., p. 117.
(3) L. R. 6 P. C. 31; *ante*, vol. 1., p. 63.

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was in force at the time the B. N. A. Act, 1867, was passed and came into operation, the Governor in Council of the late Province of Canada was authorized to impose taxes or duties upon legal proceedings had in any of the courts of Lower Canada, and these taxes were to form part of the building and jury fund of the district in which they were collected. Subsequently by an Act passed in 1864 (27 & 28 Vict. c. 5, s. 4) it was enacted that these taxes or duties should be paid by means of stamps.

By the 65th sect. of the B. N. A. Act, 1867, it was enacted that—

"All powers, authorities and functions which under any Act of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland or, of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective executive councils [420] thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the union in relation to the Government of Ontario and Quebec respectively, be vested in and shall and may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective executive councils, or any members thereof, or by the Lieutenant-Governor individually as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the respective Legislatures of Ontario and Quebec."

By the 126th section of the B. N. A. Act, it was also provided that:

"Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick, had before the union power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one consolidated revenue fund to be appropriated for the public service of the Province."

It is clear, therefore, that by force of the 65th section, the power which by Con. Stats. of Lower Canada, c. 109, was vested in the

Governor in Council of the former Province of Canada, of imposing taxes and duties on legal proceedings, passed to and vested in the Lieutenant-Governor in Council of the Province of Quebec. There cannot be a question as to this ; it was originally a power exclusively concerning and relating to that portion of Canada which constitute l the new Province of Quebec, and one the exercise of which did not involve any interference with any other portion of the D minion, or any extension of authority beyond the territorial limits of Quebec, and therefore it was, according to the most strict and narrow construction which could be given to the language of the 65th section, [421] a power capable of being exercised after the union in relation to the Government of Quebec. It follows, that prior to and at the time of the passing of the Provincial Act, 39 Vict. c. 8, the Lieutenant-Governor in Council of the Province of Quebec, had the power of imposing a tax or duty upon each exhibit filed in the courts pursuant to the authority conferred by Con. Stats. of Lower Canada, c. 109.

Then, as the produce of such a tax would be in the words of section 125, a duty or revenue reserved by the B. N. A. Act to the Government of the Province of Quebec, it would, under the express provision of the last mentioned section, form part of the consolidated revenue fund of that Province. It was, therefore, up to 1875, when the 39 Vict., c. 8, was passed, quite within the competence of the Lieutenant-Governor in Council, not merely to impose this tax or duty on the filing of exhibits, but further to provide that the proceeds of the tax, instead of being paid as before confederation, into the jury and building fund of each district, should be paid into the consolidated revenue fund of the Province ; indeed, it was not merely within the power of the Governor in Council to order the moneys so collected to be thus disposed of, but they were by law bound to make such a disposition of them, since the tax would come under the denomination of a tax or duty reserved to the Government of the Province, and was also a revenue over which the Legislature of the Province of Canada, before the union, had a power of appropriation ; for there can be no doubt or question that although the building and jury fund was kept apart from the consolidated revenue fund of the Province of Canada, and was to some extent a l cal fund, it was nevertheless a fund produced by taxes payable to the Crown, over which the Legislature of the old Province of Canada [422] had absolute powers of control and disposition. It can, therefore, be demonstrated that the Lieutenant-Governor in Council

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could, under the Consolidated Statutes of Lower Canada, c. 109, have done precisely what the Legislature did by the Act of 1875 (39 Vict. c. 8,) have imposed a tax of ten cents on every exhibit filed in a cause, such tax to be payable by stamps, and the proceeds of the sale of the stamps to be paid into the consolidated revenue of the Province.

Then, can it be said that it was any usurpation on the part of the Provincial Legislature when they assume to themselves this same power which the Provincial Executive could, under the express provisions of the Confederation Act, have exercised without further legislative authority? The answer to this is also to be found in the very words of the 65th section of the B. N. A. Act, which expressly provides that the powers of that section transferred to the Provincial Governments shall be "subject to be abolished or altered by the respective Legislatures of Ontario and Quebec." That the transfer from the executive to the legislative department of the Government, of the authority which had been in the manner already indicated reserved to the Lieutenant-Governor in Council, was an alteration within the meaning of the authority given to the Legislature to alter powers thus vested, is surely too plain to require or even to be susceptible of argument; having the right to abolish the power altogether, it must have been competent to the Legislature, under the lesser authority given to alter, to assume the exercise of it themselves, and thus to provide that these functions of legislation and taxation which, in the old Province of Canada had been delegated to the Governor in Council, should in the future be attributed to and exercised by the appropriate constitutional depository of such power, [423] the Legislature itself. Under the express authority to alter, contained in the 65th sect., and also under sub-sect. 1 of sect. 92, authorizing constitutional changes, the Legislature could therefore have passed an Act expressly and formally revoking the authority given to the Governor in Council by Consolidated Statutes of Lower Canada, c. 109, and providing that thereafter, the taxes authorized by that statute to be imposed by Order in Council, should only be levied under the authority of the Legislature itself. And if it could have thus expressly revoked or transferred the power in question, it could also do so by implication as well; and this it did, when by 39 Vict. c. 8. and the subsequent statute 43 & 44 Vict. c. 9, by which the provisions of the first mentioned Act are renewed and consolidated, it imposed the tax now called in question.

The foregoing is in accordance with the view taken in the Court

of Queen's Bench by Mr. Justice Cross, in whose judgment I agree in every respect.

I am therefore of opinion that the 9th section of the statute 43 & 44 Vict. c. 9, was not *ultra vires* of the Legislature of the Province of Quebec, and that this appeal must consequently be dismissed with costs.

FOURNIER, J. :—

This question has been so fully treated by Sir A. A. Dorion that I do not see what I could add. In my opinion this is an indirect tax, and therefore the Local Legislature had no right to impose it. I also agree with the reasons given by the Chief Justice of this Court.

HENRY, J. :—

Under the B. N. A. Act, the Local Legislatures were not authorized to impose any indirect tax, and it is for us to consider now whether this Act (43 & 44 Vict. c. 9) and this Act only (for that is the only one before us) was within the powers of the Quebec Legislature since 1867. The first question is—is it a direct or an indirect tax? I have no hesitation in saying that it is an indirect [424] tax. That tax was not for the payment of juries or other purposes connected with the court, but it was to be paid into the consolidated revenue fund of the Province. Now, carrying out the principle that is involved, if that is within the powers of the Local Legislature, where is the limit to be? We might go on to any extent. The Judicial Committee of the Privy Council have decided in *Attorney-General for Quebec* v. *Queen Ins. Co.* (1), that they could not impose a duty by stamps, because it was an indirect tax. This court decided that the Legislature of Ontario had no right to levy an indirect tax on brewers, because it is taken indirectly from the pockets of the consumers. (2) Now, this tax is to be taken out of the pockets of suitors and placed in the general revenue of the Province. That is to all intents and purposes an indirect tax, and therefore I think the Legislature exceeded its powers. As to whether the Legislature had that power or not, and many of the matters argued, we have already had under the consideration of this court, and the decisions we have given on this very question, render it unnecessary

(1) 3 App. Cas. 1090; *ante* vol. 1., p. 117.

(2) [See *Severn* v. *The Queen*, 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.]

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that I should say much. I think the appeal ought to be allowed, and the judgment below reversed.

TASCHEREAU, J. :—

I am of opinion, with the Superior Court of Montreal, and the learned Chief Justice of the Court of Queen's Bench, that the tax in question here is not a direct tax, and that it is by direct taxation only that the Provincial Legislatures can raise a revenue for Provincial purposes. I am also of opinion that the said tax is what the statute itself calls it, really a tax or duty, and not a fee of office under c. 93 of the Consolidated Statutes L. C. The fees of the officers of the court have not been increased, and were not intended [425] to be increased by the Act impugned ; they do not collect it, neither does it inure to their benefit in any way. On these three points, we are, I believe, unanimous. I am, however, of opinion that the section of the Act 43 & 44 Vict. c. 9, imposing this duty of ten cents on each exhibit, is not *ultra vires*, and this upon the following ground.

Before confederation the Governor in Council could clearly, under sect. 32, c. 109, of the Con. Stat. L. C., have imposed such a tax or duty, payable in stamps by the Act of 1864. Under sects. 65 and 129 of the B. N. A. Act, this power was continued to the Lieutenant-Governor in Council, and under these two sections the exclusive power to repeal or alter the said provisions of the said chapter of the Consolidated Statutes, or of the said Act of 1864, was vested in the Provincial Legislature. The Provincial Legislature, consequently, must have, and alone have, complete control over the building and jury fund created under the said chapter of the Consolidated Statutes, including the power to abolish it, and to enact that it shall form part of the consolidated revenue. Before confederation, under the union of the two Canadas, the consolidated fund was, of course, a fund common to both of these Provinces, so that, in order to prevent local revenues raised for special local expenses, expenses personal to one Province, from inuring to the benefit of the other Province, it was necessary to create special funds of the kind in question. Each Province levied such taxes for itself alone, and not at all for the benefit of the other, nor, in other words, for the consolidated general revenue fund, which belonged to the two Provinces jointly. But, since confederation, this reason does not exist. The consolidated fund of each Province belongs, in its integrity, to that Province and is under exclusive Provincial control.

And if the Province of Quebec has, either expressly or impliedly, by the provisions of the 31 Vict. c. 9, s. 3, or by those of the [426] particular enactment now impugned, abolished the building and jury fund, and thrown the proceeds of it into its consolidated revenue fund, it has, it seems to me, dealt with nothing but what is under its legislative control, or done nothing but what it had full power to do under the B. N. A. Act. It has imposed an additional tax, it is true, but has it not the power—and the exclusive power—to do so (not for general Provincial purposes, but for the same purposes as those for which the said provisions of the Consolidated Statutes were enacted) and this, as a consequence of the power to alter or amend them. It might be that, if in a proper case, it was alleged and proved that, for the whole Province, the expenses of the administration of justice are more than covered by the duties imposed on the law proceedings, and, if it was demonstrated that the Legislature, under pretence of providing for these expenses, has attempted, in evasion of the provisions of the B. N. A. Act, to raise a revenue for general Provincial purposes by indirect taxation on these law proceedings, the courts would then interfere and declare that these Legislatures cannot in violation of the law so enlarge the powers conferred upon them. But there is no issue of that kind raised here. What Mr. Honey, the prothonotary of Montreal, examined as a witness in this case, says on this subject, does not relate to all the expenses connected with the Montreal Court House, and, moreover, has no application to the Province at large, in which it is notorious that the deficit in the revenues connected with the administration of justice is very large. Then, it seems to me, the difference between the building and jury fund and the consolidated revenue is merely one of book-keeping. What has been paid to the building and jury fund before confederation, under [427] the Act of 1864, was deemed payable to the Crown, though for a special purpose only, and what was due to it was recoverable by the Crown. And that this tax of ten cents is *ultra vires*, because it is also, by the Act imposing it, declared to be deemed payable to the Crown, is what I cannot see. On the contrary, it seems to me clear that the Provincial Legislature alone had the power to pass an enactment like the one impugned, and to enact, as a matter of procedure, as it did by the same statute, that no exhibit shall be received in the courts of justice if not bearing this ten cent stamp. The Dominion Government has certainly not that power. So, if the Provincial Government did not have it, it would follow that, since

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confederation there would be no power anywhere to provide for the expenses of the administration of justice in the Province of Quebec, on the system and basis existing before confederation. It would follow that if a new procedure was introduced as, for instance, has been done by the introduction of the writ of injunction in 1878, the Province would have no power to impose any duty on that particular proceeding or act of procedure, or that if a new court was created, as was, for instance, the District Magistrates Court, all the proceedings in that court would be entirely free from all such tax.

These Acts of the Consolidated Statutes and of 1864 formed part of what was, at confederation, known as the Acts concerning the administration of justice in the Province and the procedure in civil matters in the courts of the Province, and as such they have been, by the B.N.A. Act, left under the exclusive control of the Provincial Legislature.

The Act 31 Vict. c. 2, imposed for the building and jury fund before confederation, repealed by the Act now impugned, re-enacted that all such duties and taxes were to be deemed payable to the [428] Crown. Then before confederation, the Act of 1864, as to these very duties, is entitled : "An Act for the collection, by means of stamps of fees of office, dues and duties payable to the Crown" ; and its preamble says : "Whereas it is expedient that all fees and charges payable to the Crown." By section 9 thereof, "it specially enacted that all the fees, dues, duties, taxes and charges payable under the said Acts and parts of Acts (including those for the building and jury fund) shall be considered to be fees, dues, duties, taxes and charges payable to the Crown for the purposes of this Act." Is it not clear that all these duties, since they have been first enacted, have always been considered to be deemed payable to the Crown? They are received and paid to certain officers, but these officers receive it for the Crown; what is so paid them is paid to the Crown.

And the argument, that because 31 Vict. c. 9, s. 3, enacts that all revenues subject to Provincial control are to form part of the consolidated fund, this new tax must also fall in that fund, seems to me untenable. Ever since the 9 Vict. c. 114, confirmed by 10-11 Vict. c. 71, of the Imperial Statutes (cap. 14 of the Consolidated Statutes of Canada) it had been likewise for the old Provinces enacted that all revenues subject to Provincial control should form a consolidated revenue fund. Yet this did not and could not prevent the Legislature of Canada (before confederation) from creating for the Province of Quebec the building and jury fund and its reve-

nues. If the appellant's contention that this new tax is illegal simply because it is declared to be deemed payable to the Crown was to prevail, it would follow that all such taxes of the same kind levied since confederation are also illegal, and have been illegally levied, since they also were all deemed payable to the Crown. and I do not believe that the appellant would be prepared to go so far.

[429] As a matter of fact, I may remark here, both the Quebec Provincial Legislature and the Dominion Parliament have, since confederation, recognized the existence of this building and jury fund, the former by, amongst others, 41 Vict. c. 16, and 45 Vict. c. 25, and the latter by the Insolvency Act of 1869, s. 152, and the Insolvency Act of 1875, s. 145.

It must also be observed that this Act 43 & 44 Vict. c. 9, is under one of its special provisions (sect. 20) to be read as forming part of the said Stamp Act of 1864, which, in its turn, must be read in connection with the said c. 109 of the Consolidated Statutes. But whether or not this building and jury fund has been abolished seems to me immaterial. I say that if it still exists, the proceeds of this new tax must go to it, though they are, by the Act, deemed payable to the Crown the same as all similar taxes imposed before confederation, which, though also deemed payable to the Crown, go to that fund; and if there is now no such special fund, it is no objection to the legality of this tax that it goes to the consolidated revenue, wherein that special fund has merged, the same as similar taxes imposed before confederation, which must now all go to that consolidated fund.

As to the ground that this is a new or an additional tax, I have already said:

1st. That, although an indirect tax, it is not a tax for the general revenue of the Province.

2nd. That the Provincial Legislature has the power under sects. 65 and 129 of the B.N.A. Act to alter or amend the Acts under which similar taxes existed on law proceedings at confederation.

3rd. That, consequently, the Provincial Legislature could impliedly, as it has done by the enactment objected to (as it can expressly), take away from the Lieutenant-Governor in Council the powers he had in virtue of the said Acts, and itself exercise these [430] powers; that, therefore, the Provincial Legislature has the power not only to abolish or diminish the said taxes, or to transfer a particular tax from one proceeding to another, but that it can also legally impose a tax or duty of a similar nature on proceedings or

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acts of procedure on which none were imposed at the time of confederation, and I presume, though unnecessary to decide for the purposes of the present case, on any new act of procedure created since confederation, provided that the Province, in the exercise of this power, confines itself to the raising of a revenue to meet the expenses of the administration of justice, on the system and basis in existence before confederation.

GWYNNE, J. :—

The real question involved in this case appears to me to be, whether any limit, and if any to what extent, is set by the B.N.A. Act to the power of the Provincial Legislatures to raise revenue by taxation. The scheme of the framers of our Federal Constitution, to provide means for the support of the Provincial Governments and legislatures, consisted primarily in a subsidy to be paid to each Province in proportion to its population, as ascertained by the census of 1861. Accordingly by the 118th sect. of the B.N.A. Act, such subsidy is provided to be paid by the Dominion of Canada to the respective Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick. By this subsidy, supplemented by such revenue raised by taxation, as is authorized by the 92nd section of the Act, together with the public property and assets assigned to each Province, all the expense attending the carrying on the several Provincial Governments must be defrayed. Now, by the 2nd item of sect. 92, the Legislatures of each Province are authorized to make laws in relation to direct taxation within the Province, in order to the raising of [431] a revenue for Provincial purposes ; by the 9th item of the same section they are authorized to make laws in relation to shop, tavern, auctioneer and other licenses, in order to the raising a revenue for provincial, local or municipal purposes ; and by the 15th item they are authorized to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in sect. 92. These are the only sections which expressly authorize the raising, by any Act of the Provincial Legislatures, any revenue whatever by any system of taxation. The public property and assets transferred to each Province constitute an additional source of revenue, but at present we have to deal only with the power of the respective Legislatures to raise by taxation a revenue for Provincial purposes.

The express provision made by item 2, which, while it authorizes

the Legislatures to make laws, in order to the raising of a revenue for Provincial purposes by taxation, limits the exercise of the authority thus conferred to direct taxation, very clearly excludes, in my judgment, the power of raising a revenue by any species of taxation other than direct; but it is contended that this is not so, and that, as there is no express clause in the Act prohibiting indirect taxation, the Provincial Legislatures have implied power to raise revenue by indirect taxation to defray the expenses attending the exercise of their jurisdiction over each and every subject placed by the 92nd section under their exclusive control, and that the particular tax in question here being a stamp tax on legal proceedings, even though it be not a direct tax, is authorized by the 14th item of section 92, which places the administration of justice, and among other things, the maintenance of Provincial courts, under the control of the Provincial Legislatures; the contention [432] being that, for the maintenance of the courts and the administration of justice, the Provincial Legislatures have, by force of this item, No. 14, implied authority to raise a revenue by indirect taxation. But that the maintenance of Provincial courts and the administration of justice are Provincial purposes, there can be no doubt. They are, therefore, comprehended within the purview of item 2 of section 92, which in express terms prescribes direct taxation as the mode of taxation to be adopted for raising revenue for Provincial purposes, so that, upon the principle of *expressum facit cessare tacitum*, there can be no such implied power involved in this item 14 as is insisted upon. Moreover, if the contention were sound, then, upon the same principle, they could equally pass an Act imposing a special tax of an indirect character for the payment of Provincial officers under a power implied under item 4 of this 92nd section, and another Act imposing another special tax, also of an indirect character, to defray the expense attending the establishment, maintenance and management of public and reformatory prisons, under the powers conferred by item 6, and another to defray the expense attending the establishment, maintenance and management of hospitals, asylums, etc., under the powers conferred by item 7; and, as in fact is boldly contended, other Acts imposing indirect taxation to defray the expenses attending the maintenance and management of all matters of a merely local and private nature, and so the effect would be, that this implied power of raising revenue by indirect taxation, which it is contended the Legislatures have, being exercised, as it might be if they have the power, to raise

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sufficient revenue to defray all the expenses of the Government and Legislatures in respect of all the several matters under their control and jurisdiction, it would be quite unnecessary for them to exercise [433] the power conferred by item 2, raising by direct taxation a revenue for Provincial purposes, or to draw upon the revenue created by the subsidy paid by the Dominion or by sale of the public property, or other income arising therefrom, or from the assets assigned to each Province. Such a contention appears to me to involve so palpable a *reductio ad absurdum* as to carry with it its own refutation; and indeed the judgment of the Privy Council in the *Attorney-General for Quebec* v. *The Queen Insurance Company* (1), in effect decides that the Provincial Legislatures cannot by any act of theirs authorize the raising a revenue by any mode of taxation other than direct.

It was further argued that, inasmuch as (as was contended) the Lieutenant-Governor of Quebec could, under the 129th sect. of the B. N. A. Act, impose the very tax which the Quebec Statutes 39 Vict. c. 8, and 43 & 44 Vict. c. 9, profess to impose, therefore it must be competent for the Legislature, by an act of legislation, to impose a tax which the Lieutenant-Governor by an act in Council could impose. Independently of the objection, which I have already urged, that there being given by the B. N. A. Act express power to the Provincial Legislatures with reference to taxation, and that being of a particular and limited character, no power of a different and an unlimited character can be implied, the contention under consideration, which, however, is not, in my opinion, raised before us in this case, proceeds upon the assumption that the Lieutenant-Governor could impose the tax in question—a position which, as it appears to me, requires for its establishment something more than its assumption—for if the Legislature of the Province has only power to impose direct taxation, and if the tax in question be not a direct tax, it would seem to be inconsistent that the Lieutenant-Governor could, since confederation, impose indirect taxation as a [434] source of revenue for a Provincial purpose which, by the Constitutional Charter, under which both Lieutenant-Governor and Legislature exist, the Legislature has no power to impose. The question which, in such case, appears to me to arise is, whether the Acts, in virtue of which the Governor-General of the late Province of Canada had, before confederation, power to impose taxes of the

(1) 3 App. Cas. 1090; *ante*, vol. 1., p. 117.

nature of the tax in question, can be Acts whose provisions are continued by the 129th sect. of the B. N. A. Act, which enacts that, except as otherwise provided by the B. N. A. Act, all laws in force, etc., shall continue, etc., etc., whether in fact, if the Legislature is prevented by the provisions of the B. N. A. Act from raising a revenue by indirect taxation, the imposition of such a mode of taxation by the Lieutenant-Governor in Council is not prevented also; and whether the provision limiting the power of the Legislature to the imposition of direct taxation is not such a provision otherwise as would exclude the Act under which such taxes had been imposed by the Governor in Council before confederation, from the operation of the 129th section of the B. N. A. Act? The 65th section appears to me to relate to acts of the Lieutenant-Governor, necessary for carrying on the Government merely, and that, unless the Lieutenant-Governor has authority to impose this tax under section 129, he cannot have it under section 65. Unless the law or Act authorizing the imposition is continued by section 129, it is plain the Lieutenant-Governor could not impose it under section 65. Here the question, however, is, whether the Acts or Act of the Legislature of Quebec, professing to impose the tax in question, are or is *ultra vires?* and the answer to that question depends upon the single point, namely: whether the tax is or not a direct tax? for the Legislatures have not, as it appears to me, any [435] power to raise a revenue for any Provincial purpose by any mode of taxation otherwise than direct. The whole expense of Government and legislation for Provincial purposes, which terms comprehend the whole expense attending all Provincial purposes placed under the control of the Provincial Government and Legislature, must be defrayed out of the produce of the public property, and assets assigned to each Province, and the subsidy paid to the Province by the Dominion—supplemented, if these sources of revenue should be insufficient, by taxation of a direct character only, in addition to the money raised under the special authority given by clauses 9 and 15 of section 92. And as I am of opinion that the tax in question is not a direct tax, a point, in my opinion, concluded by the judgment of the Privy Council in the *Attorney-General* v. *The Queen Insurance Company* (1), the appeal should be allowed with costs.

(1) 3 App. Cas. 1090; *ante*, vol. 1., p. 117.

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Dorion, C.J.

JUDGMENTS IN QUEBEC COURT OF Q.B.—APPEAL SIDE (1).

DORION, C. J. :—

The respondent, wishing to test the legality of the taxes imposed by the 43 & 44 Vict. c. 9 (Quebec), obtained a rule *nisi* for contempt against the Prothonotaries of the Superior Court of the District of Montreal, for refusing to receive and file an exhibit unaccompanied by stamps to the amount of ten cents, as required by the article.

After the return of this rule the Attorney-General for the Province of Quebec obtained leave to intervene, to sustain the legality of the tax, and contested the rule.

The Court below held that the tax was unconstitutional, and, dismissing the contestations of the appellant, declared the rule absolute against the Prothonotaries, who were condemned to be imprisoned in the common gaol of this district for a period of six months, unless they sooner accepted and filed the exhibit offered by the respondent. The Prothonotaries were further condemned to pay the costs.

The appeal is by the Attorney-General alone. Had the Prothonotaries appealed from the judgment, they might probably have raised an important question as to regularity of the proceedings adopted against them. They, however, have not done so, and the only question submitted to us, as between the appellant representing the Province of Quebec and respondent, is as to the legality or illegality of the tax, both parties having, at the hearing of the case, waived all objections as to the form or regularity of the proceedings.

Before the B. N. A. Act, 1867, the Governor-in-Council was authorized under the Con. Stat. of Lower Canada, c. 109, entitled "An Act respecting Houses of Correction, Court Houses and Gaols," to impose taxes or duties upon legal proceedings had in any of the Courts in Lower Canada (sect. 32, sub-sect. 1). These taxes or duties were to be collected in each district by persons appointed by the Governor-in-Council, and by them paid to the Sheriff of the district, to form part of the building and jury fund of his district. (Sect. 15 and sect. 32, sub-sect. 2, of same Act.)

By an Act passed in 1864 (27-28 Vict. c. 5, sect. 4), it was provided that these taxes or duties should be collected by means of

(1) [The Judgments of the Judges of the Queen's Bench and of Mr. Justice Mackay in the Superior Court, are printed from the appeal book, prepared for the appeal to the Supreme Court of Canada.]

stamps. Duties were imposed by the Governor-in-Council, under these statutes, which were still in force when the confederation of the several Provinces took place; and by sect. 129 of the B. N. A. Act, 1867, they were continued in force until they should be *repealed*, *abolished* or *altered* by the Legislature having authority under the Act to do so; that is, by the Legislature of the Province of Quebec.

In 1875, the Legislature of the Province of Quebec, by the Act, 39 Vict. c. 8, for the first time imposed a tax of ten cents on the filing of every exhibit in a cause. This tax, payable by means of stamps, was to form part of the Consolidated Revenue of the Province of Quebec (sects. 1 and 2).

This Act was repealed by the 43 & 44 Vict. c. 9, and the same tax of ten cents on the filing of exhibits was re-imposed (sect. 9). Although this Act does not expressly declare that this tax shall form part of the Consolidated Revenue of the Province, as the repealed Statute (39 Vict. c. 8) did, yet it enacts that all the duties therein mentioned shall be deemed payable to the Crown (sect. 3, sub-sect. 2), and they necessarily fall under the provision of the 31 Vict. c. 9, sect. 3, which declares that all revenue whatever over which the Legislature of the Province has power of appropriation, shall form one Consolidated Revenue Fund to be appropriated for the public service of the Province.

This special tax has therefore been imposed since the B. N. A. Act by the Legislature of the Province of Quebec, to form part of the Consolidated Revenue of the Province.

By the B. N. A. Act, 1867, sect. 92, sub-sect. 2, the Legislature of each Province is authorized to raise a revenue for Provincial purposes by means of direct taxation, and from the other sources, such as those mentioned in sub-sects. 5, 10, and 15, which have no application to the present case.

To the Dominion Parliament is given the right to raise money by any mode or system of taxation (sect. 91, sub-sect. 3). This right is exclusive when not coming within the classes of subjects assigned to the Provincial Legislatures, and as the Legislatures of the Provinces are only authorized to raise a revenue by direct taxation and the other sources of revenue already mentioned, it follows that the Parliament of Canada has the exclusive right to raise a revenue by means of indirect taxes, and that the Legislatures of the Provinces have no such right.

The terms of the Act seem clear on this point, and the Judicial

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Committee of the Privy Council have so interpreted them by deciding in the case of *The Attorney-General for Quebec* v. *The Queen Insurance Company* (1), that the tax imposed on Insurance Companies by the Act 39 Vict. c. 7, of the Legislature of the Province of Quebec, was *ultra vires*, as not being a direct tax.

The main, if not the only, question to be decided here is as to whether the tax imposed on the filing of exhibits by means of stamps is a direct or an indirect tax.

Without entering into a minute examination of the authorities as to what distinguishes a direct from an indirect tax, it will be sufficient to quote an extract of the judgment of the Judicial Committee, in the case just cited, to shew that their Lordships have, in that case, laid down a rule as to what constituted an indirect tax in such an emphatic manner that I cannot conceive how it is possible for us not to be guided by their decision.

"The single point to be decided upon this" [the effect of the 2nd sub-section of the 92nd section], said their Lordships, "is whether a Stamp Act—an Act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of Law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning, we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence, in the Courts of Law. Taken in either way, there is a multitude of authorities to shew that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to do more than refer to. But surely if one could have been found in favour of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think they are warranted in

(1) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all tréat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

"Lastly, as regards the popular use of the words, two cyclopædias, at least, have been produced, shewing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here, again, there is an utter deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that is necessary for them to say is, that finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the Legislature of England to include it in the term direct taxation, and therefore that the imposition of this stamp duty is not warranted by the terms of the 2nd sub-section of sect. 92 of the Dominion Act."

This judgment is conclusive on the point in issue. A stamp tax is not a direct tax, and therefore not within the legislative powers conferred on the Legislatures of the several Provinces composing the Dominion of Canada. The present tax is precisely of the same character as the one which the Legislature of Quebec had imposed on insurance policies by the 39 Vict. c. 7, and which was declared unconstitutional.

In both cases the tax is imposed on commodities and is paid with the expectation on the part of the party who pays it, that he will recover it back from some other party, since in the one case the tax was to be added to the premium of insurance, and in the other it is to be included in the bill of costs. Moreover, in both cases, the documents to which the required stamps are not attached, cannot be received as evidence in a court of Justice. I fail to perceive any distinction between this case and the one of *The Attorney-General for Quebec* v. *The Queen Insurance Company* (1).

It is, however, argued on behalf of the appellant that although it

(1) 3 App. Cas. 1090; *ante*, vol. 1., p. 117.

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may be an indirect tax, yet, as it is raised for a special purpose, the *maintenance* of courts of justice, which, according to sub-sect. 14 of sect. 92, is to be provided for by the Legislatures of the Provinces, and as similar taxes existed when the confederation took place, and were continued in force by the 129th sect. of the B. N. A. Act, 1867, until altered or repealed, it was in the power of the Legislature of the Province of Quebec to vary this tax and to adapt it to the new conditions of Provincial existence.

It is, moreover, argued that the building and jury fund was merged into the Consolidated Revenue of the Province by sect. 126 of the B. N. A. Act, and that the new taxes raised to defray the expenses of the administration of justice must, of necessity, go into the Consolidated Revenue Fund of the Province.

This might be a fair argument if the tax imposed by the 43 & 44 Vict. c. 9, was the same as that which, at the time of the confederation, was levied under cap. 109 of the Con. Stat. of L. C., and if the building and jury fund had ceased to exist and been merged into the Consolidated Revenue Fund of the Province, but is this so in point of fact? The building and jury fund under cap. 109 of the Con. Stat. of L. C. was a local fund created for each district out of certain sources of revenue arising within the district (sect. 15). The tax on judicial proceedings which formed part of this fund was a local tax, levied by local officers and for local purposes (sect. 17). The tax of ten cents, now under consideration, imposed under the 39 Vict. c. 8, and since its repeal under the 43 & 44 Vict. c. 9, is a new tax which did not exist when the confederation took place. It is a general tax payable into the Provincial treasury and applicable to all the purposes for which the revenues of the Province may be required.

There may be no provision in the B. N. A. Act to prevent the Provincial Legislatures from authorizing the raising of a revenue for local purposes by indirect taxation, but there is one prohibiting them from raising by such means a revenue for general purposes, and the British Parliament has made but one exception to this prohibition by reserving to the Province of New Brunswick the right to collect existing lumber dues, coupled with the condition that they should not be increased (sect. 124). This shews conclusively that the intention of the Act was to deprive the Provincial Legislatures of the right to levy any revenue for general purposes by indirect taxation.

As to the contention that the building and jury fund has been

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abolished by sect. 126 of the Confederation Act and that the taxes and revenue accruing to it were merged in the Consolidated Revenue of the Province,—even supposing it were so, this could only authorize the Provincial authorities to receive existing indirect taxes, but would not entitle the Provincial Legislatures to raise new taxes for general purposes, and this tax of ten cents would be excluded. But the simple reading of this sect. 126 shews that the duties and revenues which are to constitute the Consolidated Revenue Fund to be appropriated for the public service of each Province, were those duties and revenues which before the confederation belonged to each Province and formed part of its revenue, and did not comprise the special local funds held in trust for special purposes, such as the building and jury fund which was held by the Sheriffs of each district to be applied to the repairs of court houses and gaols and to the payment of *petit* jurors in the district, for the benefit of the inhabitants of the district. It is impossible to suppose that the Imperial Parliament could have intended by a general enactment such as is contained in sect. 126, to cast that fund into the Consolidated Revenue of the Province to be applied to totally different purposes, while it retained by sect. 129 the special dispositions of the law under which this fund was raised.

As a matter of fact, this fund has been kept separate from the general revenue of the Province, since confederation, as it was before, and its existence has been expressly recognised by the Legislature by an Act passed in 1878 amending cap. 109 of the Con. Stat. of L. C. and exempting rural municipalities from contributing to it, on making a declaration that they did not desire that the *petit* jurors of the municipality be paid for their services (41 Vict. c. 16). The provisions of cap. 109 of the Con. Stat. of L. C. being still in force except as to such portions as may have been amended since confederation, it is in the power of the Governor-General in Council, under sect. 19, to increase the contributions required from the municipalities to supply the deficiencies in the building and jury fund. The effect of the present law, if constitutional, would be, in that case, that while the districts would be made to support the repairs of gaols and court houses and the payment of *petit* jurors as heretofore, yet the Legislature of the Province could withdraw from the fund created for that purpose the indirect taxes forming part of it, to apply the same to the general purposes and wants of the Province, while they can only raise a revenue by direct taxation.

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I cannot find that this could have been intended by the framers of the Act, and being of opinion that the tax on the filing of exhibits is an indirect tax which the Local Legislature had no right to impose, I would have confirmed the judgment rendered by the Court below; but, the majority of the Court holding a different view of the case, the judgment will be reversed.

RAMSAY, J. :—

This appeal gives rise to some embarrassment; to my mind, however, to little difficulty. There is a technical point to which I at once refer.

The action is taken against the Prothonotary by way of a proceeding for contempt, and the judgment condemns the Prothonotary to go to gaol. This is certainly irregular. If it be a question of contempt, the way to bring it before this Court is by writ of error. Our statutes give in express terms this remedy. However, without the condemnation as for a contempt it is an order in a case, from which there might be leave to appeal granted by special application. It has not come up to us in that shape. We might, therefore, perhaps, dismiss the appeal without adjudicating on the important subject on which it was evidently the intention of the parties, including the Attorney-General of the Province of Quebec, to have a decision. Although I think it is a wise policy on the part of Courts, generally to abstain from going further in delivering judgment than is absolutely necessary to settle the differences between the parties, still there are cases where the nature of the question is such as to require a more ample treatment. This occurs when the question involved is of public interest, and where both parties have acquiesced in the proceedings and overlooked the technical difficulty. To the people of this country the settlement of questions arising on our statutory constitution is of the utmost moment, and the delay of litigation, even for a year, may have the most disastrous results, I think, therefore, we should be neglecting our duty if we failed to deal with this case on its intrinsic merits.

The Legislature of the Province of Quebec passed an Act (43 & 44 Vict. c. 9) by the 9th sect. of which it was enacted: "There shall be imposed, levied and collected a duty of ten cents on every writ of summons issued out of any County Circuit Court, Magistrates' Court or Commissioners' Court in the Province; and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever produced

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and filed before the Superior Court, the Circuit Court or the Magistrates' Court, such duties payable in stamps."

This Act is declared to be an amendment and extension of an Act of the Province of Canada, 27 & 28 Vict. c. 5, "An Act for the collection, by means of stamps, of fees of office, dues and duties payable to the Crown upon law proceedings and registrations." (Sect. 20.) The duties levied under this Act are to be "deemed to be payable to the Crown." (Sect. 3, sub-sect. 2.) These last words might perhaps give rise to verbal criticism. It would seem by the terms of the B. N. A. Act that the Queen forms no part of the Provincial Government. Indirectly the Sovereign nominates the Lieutenant-Governor, but he is not the representative of Her Majesty. He acts by virtue of his office, and not by virtue of his commission, in this respect like the Governor-General or other officer administering the Government of Canada. But, although I think this criticism well founded, as a fact the old language has been continued both in sanctioning legislation and in carrying on those branches of administration which have devolved on the local Governments. I take it, therefore, that the Legislature intended, and did in effect, so far as it could, declare that in addition to the duties hitherto authorized to be levied by stamps on judicial proceedings in the Province of Quebec, ten cents should be charged for each promissory note produced and filed in the Superior Court, and that this duty should be collected by stamps and should form part of the general revenue of the Province. It appears that by the 27 & 28 Vict. fees collected in this way for judicial purposes were credited to a particular fund, but they were declared to be fees payable to the Crown, and I cannot see that this statutory rule of accountability, it is really no more, can have any bearing on the question before us, except to shew that they were fees collected for a local object. Subsequent to the passing of this Act of the 43 & 44 Vict. by the Legislature of the Province of Quebec, the respondent produced and attempted to file a promissory note, without any stamp of ten cents being affixed. The Prothonotary refused to take it without the stamp, and the respondent refused to pay the duty on the ground that the statute was beyond the powers of a Local Legislature. It is contended that the revenues to be collected in the Province of Quebec under the 27 & 28 Vict. c. 5, do not belong to the Government of the Province, or, as I understand it, that the Government of Quebec may not apply the proceeds of these duties to its general purposes, but that the duties so fixed prior to confederation, cannot be altered or, at all

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events, cannot be extended. A rule producing results so obviously inconvenient naturally challenges scrutiny. It is difficult to realize the idea that the Legislature should have intended to charge the local Governments with the support of the administration of justice and at the same time to deprive them of their power to extend the means then recognised by law of providing therefor. The argument, however, is this : The local Government have only two means of raising money by taxation ; one is (not by licenses, as I have already observed in the case of *The Corporation of Three Rivers* v. *Sulte* (1), but) by legislation with relation to matters coming within the class of shop, saloon, tavern, auctioneer and other licenses, in order to the raising a revenue for provincial, local or municipal purposes, and by "direct taxation within the Province" for a like purpose.

Now, it is said this ten cent stamp is not a license, and it is not direct taxation. It is not pretended that it is a license, and, even if it were admitted that it was not direct taxation, I do not think the judgment sustainable. There is, however, a case of *Angers* v. *The Queen Insurance Co.* (2), which, it is contended, implies that a duty being subject to collection by means of a stamp, makes it necessarily indirect taxation. It has been said to reverse the judgment of the Court below was to overrule the ruling of the Privy Council in *Angers* v. *The Queen Insurance Co.* (2). I am not prepared to carry the authority of precedent so far as to say that I should be governed by a single decision of a higher Court, which appeared to me to be clearly against principle, even if that Court drew its inspirations from the same sources that we do. Still less should I be bound by a single *arret* of the Privy Council, which clearly misinterpreted our law. This does not seem to be a revolutionary or turbulent mode of performing one's duty. To this I may add that so soon as the Privy Council lays down as a proposition of law, the issue being clearly before them, that the local Governments have no power to tax otherwise than by licenses and direct taxation, and that direct taxation means certain taxes, and no more, then I shall accept the decision as conclusive, and conform my judgments to it, although I know that its effect must be to break up confederation. But I am not going to discuss anew or question what was then decided, but critically to examine what really was decided, and not what in the gross may seem to have been said. It appears to me that the report examined does not support the view taken by the learned Chief

(1) 5 L. N. 330; *ante*, vol. 2, p. 280. (2) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

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Justice, but only that the duty sought to be collected in that case, by a so-called license, was in reality an ordinary Stamp Act, and indirect taxation.

Their Lordships say :—"The single point to be decided upon this [the effect of the 2nd sub-section of the 92nd section] is whether a Stamp Act,—an Act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal or receipt, in a Court of Law, if the stamp is not affixed,—is or is not direct taxation?" It is true they say afterwards, in referring to the English and American decisions mentioned by Mr. Justice Taschereau, "they (the decisions) all treat stamps either as indirect taxation, or as not being direct taxation." That is, these cases decide that the particular Stamp Act referred to in each case was indirect taxation, *obiter dicta*, precisely as the case of *Angers* v. *The Queen Insurance* (1) would be an *obiter dictum*, if it decided what it is contended it did. No one can seriously contend as an abstract question, I should think, that the form of collection, the evidence of payment, can determine as to the nature of the impost. If there was a poll-tax on each elector and the law said that each elector should take a receipt therefor on paper, bearing a penny stamp, it would hardly be said that the penny stamp was a different kind of taxation from the poll-tax. So far as my recollections carry me, there is not the unanimity of opinion attributed to the economists as to the definitions of direct and indirect taxation. It seems to me they are generally dealt with as relative rather than as positive terms. They are used to express economic results. One of the best known rules is that taxation is direct when it is paid by the party who is impoverished by it. Thus, a duty on imports is regarded as indirect taxation because the consumer and not the importer usually bears the burthen. But if the consumer imports his own boots the tax is as direct as it can be. Again, if this rule were dogmatically true, it would include a license to shoot game, which might very well be accorded by a stamp.

It is very true that the term direct taxation being used in a statute in a positive sense, it is the particular function of Courts by their decisions to give it a positive meaning.

In dealing with this term, the operation is one of considerable difficulty, and we must take care in performing it, not to go outside our commission inadvertently. We have to decide what direct taxa-

(1) 3 App. Cas. 1090; *ante*, vol. I., p. 117.

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tion is within the meaning of the Act, but there is absolutely no warrant in the B. N. A. Act for our deciding that the local Governments are prohibited from collecting taxes by one form or another. As to the license it is different; the form there is material. It therefore appears to me to be indubitable, that we have authority to say that direct taxation in the Act means a poll or a property and income tax and no more, but we have no authority to say how it shall be levied. While generally admitting the utility of reference to writers on political economy, judgments, dictionaries and cyclopœdias for such enlightenment as they may furnish, it seems to me that there are other guides to interpretation quite as safe. As an example, I may quote from a still more recent decision of their Lordships the following sentence :—"It becomes obvious as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited." *(The Citizens Insurance Company* v. *Parsons)* (1).

I do not think it necessary to pursue the criticism further on this point, for the power of the Local Legislature to enact the 43 & 44 Vict. appears to me to be beyond question, even if we were to hold that the tax under consideration was indirect taxation. We have, therefore, happily, nothing to limit or to modify. Sub.-sects. 14 and 16 give the right to the Legislature of the Province to pass the law in question.

In proceeding to explain this proposition, it is proper to make two preliminary remarks: First, that the power of the local Government to tax is nowhere confined to licenses and to direct taxation, as has been assumed. They are specially permitted to impose these taxes; that is all; but this differs essentially from a prohibition to impose any other taxes. Secondly, the sub-sections of sect. 92 must be read with the general heading to avoid misconception. Thus read, sub-sect. 14 enables the local Governments to make laws in relation to "the administration of justice in the Province, including the constitution, *maintenance* and organization of Provincial Courts, both of civil and of criminal jurisdiction," etc. Is not the law impugned a law for the maintenance of justice in the Province?—nay more, a law modelled on the law existing at con-

(1) 7 App. Cas. 96, 110; *ante*, vol. 1., p. 265.

federation for its maintenance? We have held in *Corporation of Three Rivers* v. *Suite* (2), that municipal powers were to be delimited by what then existed. Is it not a similar principle we now invoke? Again, I would ask is this tax for the performance of a duty by a local functionary not a matter of a merely local nature in this Province? Does it conflict with any Dominion power? Can it be contended for an instant that the power to raise money by any mode or system of taxation can be held to signify that the Dominion Parliament could raise money on the duties to be performed by local officers? I have said that it has been assumed that the Local Legislature had only power to impose taxes by way of direct taxation and by license. I mean assumed in discussion, for the practice, as is frequently the case, is more logical than the didactic utterances regarding it. As an example, a turnpike on a local road is a tax precisely of the same kind as this. It is an exaction for a service rendered. So, when the Government exacted passage money on the North Shore Railroad it was a tax of a like kind, and I may add, moreover, it was levied by a stamp.

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I am to reverse.

CROSS, J. :—

The appeal in this case is taken from a judgment declaring absolute a rule taken against the Prothonotaries of the Superior Court at Montreal, requiring them at the instance of Reed, the plaintiff in this cause, to put on file as an exhibit a promissory note tendered to them for that purpose by the plaintiff without the revenue stamp of the value of ten cents being thereto affixed, as required by the Provincial Statute 43 & 44 Vict. c. 9.

The Attorney-General intervened to maintain the right of the Prothonotaries to exact the affixing of the stamps, as a condition precedent to the filing of the promissory note; which right was denied by Reed.

This brought into question the authority of the Provincial Legislature to impose this tax.

The questions that arise under the B. N. A. Act of 1867, Imperial Statute, 30 Vict. c. 3, are numerous and embarrassing as well as of frequent occurrence.

It is not possible in all cases to reconcile the powers whereby sects. 91 and 92 are attributed respectively to the Dominion and

(1) 5 L. N. 330; *ante* vol. 2., p. 280.

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Provincial Legislatures, nor is it easy, apart from the question of conflict, to determine the extent of the particular powers.

Before invoking considerations of a more extended character, embracing notions of a general policy, presumed intention, or otherwise, I think it is the duty of the judge to whom a like question to the present is submitted, to inquire how far a solution of the difficulty can be reached within the terms of the Statute itself, applying to this task his appreciation of the context of the different provisions that may bear upon it, not omitting the desirability of adopting, when practicable, such a construction as will facilitate and give effect to the operation of the law, so as to secure as much as possible the attainment of its objects.

Previous to confederation there existed various special funds pertaining to the Revenue Department of the then Province of Canada, raised by legislative authority for particular purposes, requiring separate accounts thereof to be kept in the financial department of the Government. Among these may be mentioned the building and jury fund for Lower Canada, as a contribution to which, under the authority of sect. 32, cap. 9 of the Con. Stat. of L. C. the Governor was authorized by any order, or orders in Council, to be from time to time made for such purpose, to impose such tax or duty as he should see fit, on any proceedings in any of the Courts in any of the districts in Lower Canada.

By Statute of the Province of Canada, 27 & 28 Vict. c. 5, the fees under the tariff, made or to be made under the provisions of the last previous'y mentioned Act, are made collectible by stamps.

By sub-sect. 14 of sect. 92 of the B. N. A. Act of 1867, there is enumerated as among the exclusive powers of the Provincial Legislatures "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was to be reasonably expected that this duty should not devolve upon the Province without according to it such revenue as had been specially applicable to that particular purpose, such as the building and jury fund. Accordingly, in the fourth schedule annexed to the Act, the building and jury fund is enumerated among the assets to be the property of Ontario and Quebec conjointly.

By sect. 65 of the Statute it is enacted, that "All powers, authorities and functions which, under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain

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and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the union, vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or of any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the union in relation to the Government of Ontario and Quebec respectively, be vested in, and shall or may be exercised by, the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of or in conjunction with, the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject, nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the respective Legislatures of Ontario and Quebec."

By sect. 129 all law Courts of civil and criminal jurisdictions, legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, are continued as if the union had not been made; "subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

From the foregoing I conclude that the regulation, modification, increase or diminution of the tariff of taxes on legal proceedings as a contribution to the building and jury fund was vested in the Governors of Canada in Council, and by the operation of the B. N. A. Act the power passed to and became vested in the Lieutenant-Governor of Quebec in Council, who, up to the time of the passing of the Quebec Statute 43 & 44 Vict. c. 9, could have lawfully imposed the tax now brought in question.

Under the authority of sect. 65 of the B. N. A. Act the Legislature of Quebec had power to impose and did impose legally the tax in question.

By sect. 126 such portion of the duties and revenues, over which the respective Legislatures of Canada, Nova Scotia and New Bruns-

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wick had before the union power of appropriation, as are by the said Act reserved to the respective Governments or Legislatures of the Provinces, and all duties or revenues raised by them in accordance with the special powers conferred upon them by said Act in each Province, are to form one Consolidated Revenue Fund, to be appropriated for the public service of the Province.

There is no other than this Consolidated Revenue Fund out of which the Courts can be maintained, or appropriations made for building and maintaining Court Houses and Gaols. And I can see no valid reason why the tax in question should not be levied and pass into this fund, out of which appropriations must be made to sustain the object for which the tax was originally imposed.

It is to be presumed that it will be applied and appropriated by the Legislature in the manner and for the purposes to which the building and jury fund, whereof it formed a part, was designed to be applied, but over that the Court can have no control—it falls to be determined by the Legislature as a matter of public policy within their jurisdiction. The question to be decided by us is simply whether the power remains with the Legislature of the Province to lawfully levy the tax in question.

I think it does so remain.

JUDGMENT OF THE SUPERIOR COURT.

MACKAY, J. :—

These proceedings were commenced in May, 1881, by a Rule taken by the plaintiff against the Prothonotary to have him compelled to receive and mark "filed" the promissory note upon which the plaintiff's action is based. The Prothonotary has refused to file that note because it has not upon it a ten cent law stamp. The Prothonotary, answering the Rule, says that by sect. 32, of cap. 109, Con. Stat. of Lower Canada, it is ordered that the Governor-in-Council may impose taxes on law papers and proceedings; that by the 27-28 Vict. c. 5, it was ordered that stamps should stand instead of the money taxes of the cap. 109 before referred to, or that might be imposed in any Order-in-Council under it; that by the 31st Vict. c. 2, of Quebec, the word stamps or stamp is defined to mean all stamps issued under cap. 5, of 27-28 Vict. or any Order-in-Council of the Governor of the late Province of Canada, or of the Lieut.-Governor of Quebec, or under this Act (of 31 Vict.) or any

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Act of this Legislature; that by sect. 12 of 27-28 Vict. c. 5, it is ordered that no paper or exhibit on which tax or duty to the Crown is payable shall be received by any Court or officer until stamped; that by sect. 10 of 31 Vict. c. 2, also, it is ordered that no paper upon which stamp ought to be, shall be received by any public officer; that by the Act of Quebec, passed in the 39th year of Vict. c. 8, it was said and is ordered that a tax of ten cents shall be payable to the Crown for the use of the Province upon each exhibit produced or offered in the Superior Court, etc., and that all dispositions of law applicable to formal duties or taxes such as this should apply to the tax or duties imposed by this Act of 39 Vict.; that by the Act of Quebec, 44 Vict. c. 9, all these Stamp Acts have been amended and recast, and a tax of ten cents imposed upon each exhibit offered to the Superior Court, and order made that no exhibit shall be received unless stamped. Then a proclamation by the Lieut.- Governor of Quebec is vaguely set forth, by which it was ordered by him and the Council that all exhibits should be stamped (when this was published is not stated, nor is it stated from what date the order is to take effect). That they (the Prothonotary) are only doing their duty in asking a ten cent stamp to be put upon the promissory note offered as an exhibit by the plaintiff; that the plaintiff has no right to get the order he seeks against them, and they conclude for the discharge of the rule. There is answer by the plaintiff that the Quebec Legislature statute law, by which the Prothonotary would justify the claim of a ten cent stamp from plaintiff, was and is *ultra vires* of the Legislature, not warranted seeing the B. N. A. Act of 1867, that the ten cent tax or stamp duty is not authorized by that Act, and is not direct but indirect taxation, and therefore illegal, and so the rule taken must be absolute. The Attorney-General of Quebec has intervened in the case to support the Prothonotary, and his claim to have that ten cent stamp before filing the promissory note referred to. For reasons of intervention he repeats very much the arguments of the Prothonotary, but commences by alleging formally that the administration of justice is left to the charge and under the control of the Provincial Legislature; that this administration causes great expense, and necessitates the employment of officers and servants, all of whom have to be paid by the Provincial Governments; that particularly the Government is obliged to employ persons to have care of all documents produced before the different Courts of law, and that by law these persons are paid out of the Consolidated Revenue

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Fund of the Province. The plaintiff answers the Attorney-General very much as he does the Prothonotary; he adds some allegations, for instance, this one, that the ten cent tax upon exhibits demanded from plaintiff has no connection with the fees or salaries of the Prothonotaries or others employed in the Courts. Having thus fully stated the pleadings, I observe that the tax of ten cents on exhibits was first imposed by the 39 Vict. c. 8, of Quebec, entitled "An Act to aid the grant for the purposes of the administration of justice." Its first section imposes a duty of ten cents, payable to the Crown, for the uses of the Province, to be levied on each receipt, bill of particulars and exhibit whatsoever, produced before the Courts. By its second section the duty is ordered to form part of the Consolidated Revenue Fund of the Province. These two sections of the 39 Vict. have been repealed by the 43-44 Vict. c. 9, of Quebec, entitled "An Act to amend and consolidate the different Acts therein mentioned, in reference to stamps." Its sect. 9 again enacts the duty of ten cents on bills of particulars, and exhibits, produced before the Courts. The moneys levied fall, by the 31 Vict. c. 9, to the Consolidated Revenue Fund. The 43-44 Vict. c. 9, orders that it and the 27-28 Vict. c. 5, of the late Province of Canada, as thereby amended, shall be read together as one Act. This 27-28 Vict. authorized stamps to be issued by order of the Governor-in-Council, and the provisions of it are ordered to extend to the taxes and duty imposed by the 32nd sect. of cap. 109 Con. Stat. L. C., "so long as such fees continue to form part of the building and jury fund, or of the Officers of Justice Fee Fund."

Under the constitutional Act, the B. N. A. Act of 1867, the Provinces may not tax, or raise revenue, just as they please. Sub-sect. 2 of sect. 92 of it only permits direct taxation in order to the raising of a revenue for Provincial purposes; a later sub-section allows also shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local and municipal purposes. The Imperial Parliament has designedly laid specific restrictions upon the taxing power of the Local Legislatures. It has not abandoned the taxing power to their mere will. So the question, What is lawful taxation? may always be brought before the Courts and will have to be decided ultimately by the judiciary. It has been argued that the ten cent duty is "direct taxation." If it be *that*, it has been well enough imposed. What is direct taxation? Its prominent feature is that it is exigible from, and is to be borne by him who immediately pays it; a tax which the person first paying

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it may charge over to or against any other is an indirect tax. Stamp duties on law papers and proceedings are expressly called indirect taxes by almost all the writers on political economy, by all, in fact, except one, Mr. Craig, in so far as I have been able to discover. He wrote seventy odd years ago. It has been said for the Attorney-General that the Local Legislature charged with the administration of justice can impose any tax in order to provide for that administration. But it is not so ; for, as said before, the Local Legislature can only tax as by the B. N. A. Act. The framers of that Act knew the import of words. They knew what the power of taxation was and means. They give power to tax "by any mode or system," to the Dominion Parliament. Our condition would have been intolerable had like power been conferred upon the Local Legislatures. So the power of these is limited designedly, as I have said before. It has also been said that this stamp tax might have been imposed by an Order-in-Council, under Con. Stat. L. C., c. 109, sect. 32, entitled "An Act respecting Houses of Correction, Court Houses and Gaols." But it has been imposed, not by the Lieut.-Governor-in-Council, but by another body, the Legislature, and its proceeds are to go, not to the building and jury fund, but to the Consolidated Revenue Fund ! The question before me is as to the power of the Legislature, not of the Governor-in-Council. I hold the stamp duty in question to involve not direct, but indirect, taxation, and that the Legislature of Quebec in imposing it has exceeded its powers. This stamp duty does not answer the description given of "direct taxation," and is no more such than was the one on the policies of insurance under 39 Vict. c. 7, of Quebec ; (1) so the rule taken by the plaintiff must be made absolute, and the intervention is dismissed.

(1) [*See Attorney-General for Quebec* v. *Queen Ins. Co.*, 3 App. Cas. 1090 ; *ante*, vol. 1., p. 117].

SUPREME COURT OF CANADA.

1883*
March 5.
1884*
February 19.

ALPHONSE POULIN ..... *Appellant;*

AND

THE CORPORATION OF QUEBEC..... *Respondent.*

On appeal from the Court of Queen's Bench for the Province of Quebec

[*Reported 9 Can. S. C. R. 185.*]

Municipal Institutions—Regulation of sale of liquors—42-43 Vict. c. 4, Q.

The Provincial Legislatures have authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays or at special times.

The Statute 42-43 Vict. c. 4 (Quebec) which requires houses in which spirituous liquors etc. are sold, to be closed during the whole of Sunday and on every other day between 11 p.m. and 5 a.m. is valid, (Ritchie, C. J., and Strong and Fournier, JJ.)

[186] Appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (Appeal side) (1). The following case was submitted to the Supreme Court of Canada.

"At its session of 1879, the Legislature of Quebec passed an Act containing the following enactments:

"'Every person licensed or not licensed to sell by retail in quantities less than three half pints in any city, town or village whatsoever, spirituous liquors, wine, beer, or temperance liquors, shall close the house or building in which such person sells or causes to be sold, on any and every day of the week from midnight until five o'clock in the morning, and during the whole of each and every

* Present:—RITCHIE, C. J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

(1) 7 Quebec Law Rep. 337; *post*, p. 237.

Sunday in the year; and during the same period, no person shall sell, or cause or allow to be sold or delivered, in such house or building, or in any other place, spirituous liquors, wine, beer, or temperance liquors, the whole under a penalty for each and every infringement of the present provisions, of a fine not less than thirty dollars and not exceeding seventy-five dollars and costs, and in default of payment of such fine, to an imprisonment for a period not exceeding three months in the common gaol of the district in which the said infringement occurred.'

"On the 18th of January, 1880, the appellant was, and had been for some time before, keeping a restaurant within the limits of the city of Quebec.

"Being prosecuted by the respondent before the Recorder's Court of the city of Quebec for infringement of that statute, he pleaded to the jurisdiction of the court, and especially the unconstitutionality of the Act as being *ultra vires* of the Legislature of Quebec. He was, nevertheless, on the 17th of February, 1880, condemned to pay a fine of $40 and $1.65 costs.

"The appellant sued out and obtained a writ of prohibition to prevent execution of that judgment.

"It was proved in the case, that on the day [187] mentioned in the conviction, viz., the 18th of January, 1880, the appellant was keeping a restaurant within the limits of the city of Quebec, where he used to retail spirituous liquors in quantities less than a half pint, and that, although the said day was on Sunday, he had not kept his establishment closed.

"On that proof the Superior Court quashed the writ of prohibition."

F. Langelier, Q. C., for appellant. This appeal involves the decision of two questions of law: 1st. Can a Local Legislature pass a law prohibiting the sale of spirit-

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ARGUMENT.

uous liquors on Sundays and at certain hours of other days? 2nd. Does the statute of Quebec, 42-43 Vict. c. 4, s. 1, punish the selling only of liquors within the prohibited time, or also the opening of the establishment where they are sold?

It is now beyond all doubt that Local Legislatures cannot totally prohibit the sale of such liquors. This Court, in the case of the *City of Fredericton* v. *The Queen* (1), has laid down as a rule. 1st. That the power to enact such a prohibition cannot belong to both the Local Legislatures and the Parliament of Canada. 2nd. That it belongs to the Parliament of Canada; and that ruling has been confirmed by the Privy Council in the case of *Russell* v. *The Queen* (2).

There would be no difficulty, therefore, if the statute in question contained a complete prohibition; but it is contended that the ruling of this Court cannot apply to it because it does not prohibit, but only restricts the sale of spirituous liquors.

This is a mere quibble. A restriction is a partial [188] prohibition; in the present case the prohibition is for Sundays and certain hours of other days. If this reasoning was to prevail, nothing would be easier for a Local Legislature than to encroach upon the exclusive power of the Parliament of Canada to prohibit such trade; all they would have to do would be to prohibit the sale at all times, save a few minutes every day, or every week.

It has been contended that such a statute is within the class of local statutes, or of statutes concerning municipal institutions.

Even were that true, it would not affect the question at issue. That statute unquestionably deals with and regulates a certain trade or commerce. Therefore, according

(1) 3 Can. S. C. R., 505, 574; *ante* vol. 2, p. 27.
(2) 7 App. Cas. 829; *ante* vol. 2, p. 12.

to the decision, *City of Fredericton* v. *The Queen* (1), it cannot be considered as being within the powers of Local Legislatures.

But it is not true that the statute in question is a mere municipal regulation, or a law of a local nature. It is admitted to be intended to repress intemperance, to prevent drunkenness; therefore its object is one of general interest; intemperance and drunkenness are just as much evils in Halifax as in Quebec.

If the object of the law is of general interest, are the means enacted for that purpose of a local nature? Not at all; those means consist in compelling those who sell spirituous liquors by retail, to close their establishments at certain times, and in preventing them from selling within certain hours. Now there is nothing local in those means; they would be just as effective at Winnipeg as at Charlottetown: *Russell* v. *The Queen* (2).

The power to enact such a law is not included in the power given to Local Legislatures to regulate municipal institutions. The object of such institutions is to give to each locality the particular regulations required [189] by its local wants. No municipal institutions would be needed if the making and keeping of roads, bridges, the prevention of abuses prejudicial to agriculture, could be regulated in the same manner all over the country. But they are necessary on account of the fact that a special regulation is required for each locality.

C. P. Pelletier, Q. C., for respondent:

[190] Before the other courts, the appellant has contended not only that to establish an offence it would have been necessary for the respondent to prove a sale of liquors but also that the Legislature of Quebec had no right to prohibit the sale of intoxicating liquors on Sundays.

(1) 3 Can. S. C. R. 505; *ante* vol. 2, p. 27. (2) 7 App. Cas. 829; *ante* vol. 2, p. 12.

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As the complaint in this case is only "for not [191] having closed," and not for "having sold," if the statute is interpreted as making an offence of the mere fact of "not closing," and if the conviction against the appellant is found to be valid, it is of little moment, for the ends of this case, to consider the question of the prohibition of selling liquor on Sundays.

However, as that incidental question has been strongly dwelt upon before the other courts, and as the other courts have considered it with much attention, it may be convenient also to consider it now.

Although the Parliament of Canada under the power given to it to regulate trade and commerce alone has the power to prohibit the trade in intoxicating liquors, yet the Provincial Legislatures, under the power given to them, may for the preservation of good order in the municipalities which they are empowered to establish and which are under their control, make reasonable police regulations, and may to some extent interfere with the sale of spirituous liquors.

The provisions of the Provincial statute 42-43 Vict. c. 4, ordering houses in which spirituous liquors, etc., are sold to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the Legislature of the Province of Quebec.

The reasons for arriving at this conclusion are fully stated by Chief Justice Meredith in the case of *Blouin* v. *The Corporation of the City of Quebec* (1), and I rely upon that decision.

RITCHIE, C. J. :—

I cannot see how it can be said that prohibition will not lie without first determining whether the Act is *ultra vires*

(1) 7 Quebec Law Rep. 18 ; *ante* vol. 2, p. 368.

[192] or not, for if the Act is *ultra vires*, then I can see no reason why prohibition would not be a proper remedy, because there could then be no pretence that the Recorder's Court could have jurisdiction over an offence alleged to be created by a statute which had no legal existence; but holding the Act to be *intra vires*, I fully appreciate the position taken by Mr. Justice Ramsay, that the Recorder's Court having jurisdiction over the subject-matter legislated on, however badly it may judge it cannot be stopped by prohibition, on the pretext that it has misconstrued the Act.

Mr. Justice Ramsay clearly acted on this view, for before holding that prohibition would not lie, he expressly held that the Local Legislature had authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at particular times, as being purely a matter of police regulation, and consequently within the powers of municipal corporations.

When, in the case of *Regina* v. *Justices of Kings* (1), I was called upon to adjudicate on the right of the Provincial Legislatures to prohibit absolutely the sale of spirituous liquors, and I arrived at the conclusion that the legislative power to do this rested with the Dominion Parliament, I advisedly and carefully guarded the enunciation of that conclusion in these words: "We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, etc., and sale of spirituous liquors in public places, as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of munici-

(1) 2 Pugsley 535; *ante* vol. 2, p. 499.

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pal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate."

[193] I still think, as I did then, that a provision such as sect. 1, of the 42-43 Vict. c. 4, Quebec Act, is within the legislative authority of the Provincial Legislature, as being simply a local police regulation, and which the Local Legislature has, as incident to its power to legislate on matters in relation to municipal institutions, a right to enact.

As at the time of the passing of this Act and at the time of the committing of and conviction for the alleged breach of the law, there was no Dominion legislation contravening in any way the provisions of this Provincial law, it is not necessary, for the purposes of deciding this case, to inquire or determine if, and in what particulars and to what extent, the legislation of either will prevail over that of the other, when the Dominion Parliament is legislating for the peace, good order, etc., of the Dominion—or on the subject of trade and commerce in connection with the traffic in intoxicating liquors—should the Dominion legislation conflict with the Provincial.

In the view I take of the inapplicability of the remedy by prohibition, the Act being, in my opinion, *intra vires*, it is unnecessary to express any opinion as to the construction of the first sect. 42-43 Vict. c. 4, though I by no means wish it to be understood that I think the construction placed on the statute by the Recorder's Court incorrect. I merely express no opinion on it, as not being necessary for the determination of the case before us.

STRONG, J.:—

I agree with the Chief Justice that the attempt to impeach the constitutional validity of the statute under which the appellant was convicted, as being *ultra vires*

of the Legislature of the Province of Quebec, altogether [194] fails. In the *Queen* v. *Taylor* (1), I expressed my concurrence in the decision of the Supreme Court of New Brunswick, in the case of the Justices of Kings (2), in which it was held that under the authority conferred by the B. N. A. Act to legislate respecting municipal institutions, the Provincial Legislature possessed that power generally denominated the police power, to regulate the sale of spirituous and intoxicating liquors, and I adhere to that opinion. Then, I think that this appeal must be disposed of without pronouncing any opinion upon the question of statutory interpretation which was argued before us, for it is plain, as I read the authorities, that this is not a case in which the writ of prohibition will lie.

[The remainder of the judgment is occupied in considering whether the writ of prohibition would lie. The learned Judge was of opinion that the writ issued improvidently and was properly quashed.]

FOURNIER, J., concurred with the Chief Justice.

[HENRY, TASCHEREAU and GWYNNE, JJ., did not give any opinion on the constitutional question. The learned Judges considered that the penalty imposed on the appellant by the Recorder was not authorized by the statute 42-43 Vict. c. 4, and that the prohibition was therefore rightly granted.]

JUDGMENTS IN QUEBEC COURT OF Q. B.—APPEAL SIDE.

[*Reported 7 Quebec Law Rep. 337.*]

[*Translated.*]

TESSIER, J. :—

[338] This case is of more than ordinary interest, not only as a question of jurisprudence, but also as a question affecting order and public morality.

(1) 36 U. C. Q. B. 218. (2) 2 Pugsley 535; *ante* vol. 2, p. 499.

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The appellant, Poulin, has been sentenced in the first instance by the Recorder's Court of the City of Quebec to pay "a fine of $40 for not having closed during the whole of Sunday the 18th of January, 1880, the house or building in which he sold spirituous liquors."

Against this sentence Poulin obtained a writ of prohibition from the Superior Court. After trial and argument this latter Court, presided over by the Honourable Chief Justice Meredith, on the 23rd of March, 1881, affirmed the sentence of the Recorder by the following judgment:

"Considering that although the Parliament of Canada under the power given to it to regulate trade and commerce alone has the power to prohibit the trade of intoxicating liquors; yet that the Provincial Legislatures under the power given to them, may, for the preservation of good order in the municipalities which they are empowered to establish and which are under their control, make reasonable police regulations, although such regulations may to some extent interfere with the sale of spirituous liquors;

"And considering that the provisions of the Provincial statute 42-43 Vict. c. 4, ordering houses in which spirituous liquors, etc., are sold to be closed on Sundays and every day between eleven of the clock of the night until five of the clock of the morning, are police regulations within the power of the Legislature of the Province of Quebec;

"And seeing that, by the section number five of the last mentioned statute, keepers of hotels and houses for the lodging and entertainment of travellers are to a certain extent exempted from the operations of the said statute, but seeing that the plaintiff, even according to his own allegations, is not, and was not at the time he was prosecuted and convicted, as complained of by him, one of the persons so exempted from the operation of the said statute;

"It is, in consequence, ordered and adjudged that the writ of prohibition in this cause issued be and the same is hereby set aside and quashed, and the petition and demand of the said Alphonse Poulin is hereby dismissed, the whole with costs in favour of the defendants."

[339] It is from this judgment that there is an appeal to this Court.

The appellant Poulin, has put forward several objections, amongst others: that the statute of the Legislature of Quebec, 42-43 Vict. c. 4, under which this sentence was pronounced in the first instance,

is *ultra vires*, not comprised in the jurisdiction and functions of the Legislature of Quebec, because the Confederation Act (section 91) gives the Federal Parliament exclusive power over "the regulation of Trade and Commerce."

It is one of the rules in the interpretation of a statute that all its provisions must be compared in order to give them a reasonable sense according to the intention of the legislator and so as to render the statute more effective in practice. Now in the division of legislative powers between the Federal Parliament and the Provincial Legislatures, the language used allows the greatest elasticity of interpretation in order to leave to the Courts the power of applying them, not to create a conflict between the legislative bodies, but to facilitate the execution of these different powers.

If it were necessary to give a strictly literal interpretation to these words "regulation of trade and commerce," we might repeat the adage, "the letter killeth;" but it is necessary rather to add as the whole adage expresses it: "the letter killeth, but the spirit of the law giveth life."

In fact we should destroy the extensive powers which the Confederation Act has given exclusively to the Provincial Legislatures, amongst others:

"Municipal Institutions."

"Shop, saloon, tavern, auctioneer and other licenses," etc., and "property and civil rights in the Province."

"Generally all matters of a merely local or private nature in the Province." (Section 92.)

Is it not part of municipal institutions to make rules and police regulations for preventing disorder on Sunday and at night, by compelling innkeepers and saloon-keepers to keep their bars closed during the above mentioned times?

Is it possible to question the power of our Local Legislature, or even of our municipal corporation, to prevent the sale and storing of powder except in certain places and with certain precautions for public safety? This however is a matter of trade like all others.

[340] It is manifest that by the words *trafic et commerce*, especially the English words "trade and commerce," it was intended to express legislation over the general interests of commerce which relate to the whole Dominion of Canada, the mode of importing and exporting merchandise, the storing of this merchandise in towns so as to protect the customs, entire prohibition in certain cases for the general protection of the commerce of the Dominion, but not

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special laws of Provincial Legislatures which do nothing more than regulate the mode of selling and trading in certain "matters of a merely local nature in the Province."

I am not amongst those who can be induced to limit the rights of the Provinces in useful legislation for the public good, especially when the Federal Government armed with the power of placing a veto on these Acts of the Provincial Legislatures does not think fit to disown them. (Section 90.)

This Provincial statute then comes completely within the powers of the Legislature of Quebec.

The second objection is serious and relates to the particular words of this statute, which constitutes the offence in question. Do these words of sect. 4 of the Quebec statute of 1879, 42-43 Vict., include one offence only of keeping the house open and selling therein drink on Sunday, or two offences, the one of keeping the house open and the other of selling therein drink or spirituous liquors?

[The remainder of the judgment is occupied with the consideration of this second objection. The learned Judge was of opinion that the intention of the Act was to constitute two distinct offences.]

I have much pleasure in concurring in this judgment of the Court of Appeal which confirms the sentence of the Superior Court on all points as well as the original sentence.

RAMSAY, J. :—

[341] The principal question raised in this case, is as to the authority of the Local Legislature to prohibit or regulate the sale of liquors in saloons or taverns on Sundays or at particular times. It seems to me that this is purely a matter of police regulation, and consequently it is within the powers of municipal corporations, and that the exercise of such a power cannot be considered as being a restriction of trade and commerce. It is possible, as the appellant suggests, that this decision may lead the way to questions of greater difficulty, but it is also possible we may be relieved from the responsibility of their decision.

A second question in this case is whether the act charged is an offence at all. I do not feel called upon to express any opinion as to the meaning of section 1, 42-43 Vict. c. 4 (Quebec), and, not being obliged to do so, I willingly refrain. I may say, however, that in the interpretation of a penal statute I do not feel justified in going beyond the express meaning of the Act. But it appears to me that the complaint is clearly within the Act, whether the complaint be

well or ill expressed, and therefore I do not think that the Recorder can be interfered with on prohibition.

[The remainder of the judgment is occupied in discussing the question of prohibition.]

[*Translated.*]

DORION, C. J. :—

[342] The appellant has been prosecuted before the Recorder of the City of Quebec, under the statute of Quebec, 42-43 Vict. c. 4, s. 1, for not having closed during the whole of Sunday, the 18th of January, 1880, the house in which he sold spirituous liquors.

On this prosecution he has pleaded that the Recorder had no jurisdiction, because the statute relied on did not authorize such a prosecution as the present, and, secondly, because the statute was *ultra vires*, and that the regulation and restraint of the sale of liquor came within the exclusive jurisdiction of the Dominion Parliament.

This defence has been overruled and the defendant sentenced to pay a fine of $40.

He has moved for a writ of prohibition to restrain the Recorder from enforcing this judgment, and, on the merits, the Superior Court has affirmed the judgment of the Recorder and refused the prohibition.

The appellant has appealed from this judgment.

Two questions are submitted to us :

1. Is the statute 42-43 Vict. c. 4 unconstitutional ?

2. If the statute is not *ultra vires*, do the facts stated in the complaint support a prosecution under this statute ?

As regards the first point, I should be disposed to say that the words "trade and commerce," in sub-s. 2 of s. 91 of the B. N. A. Act should not be interpreted in the widest sense and as embracing [343] all trade and commerce whatever, even the most insignificant matters of local commerce, and that, in this view, the statute of Quebec, though restraining to some extent the trade in intoxicating liquors, is not *ultra vires*. But we are all agreed in saying that it is not necessary to decide this question in the present case. The statute under consideration has not been passed to regulate the sale of liquors. It is a police measure adopted for the preservation of good order and the public peace. This is a matter merely local, and which as such is subject to the authority of the Provincial Legislatures under sub-s. 16 of s. 92 of the Constitutional Act. This question has already been decided several times in the Province of

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Q.B., Quebec.

Dorion, C.J.

Ontario, and, amongst others, in the case of *Reg.* v. *Taylor* (1) in the Court of Queen's Bench. That Court has decided "that the restriction imposed by the Ontario Legislature on brewers not to sell by retail, as defined by the Act of 1874, is not *ultra vires*, because it is a mere repetition and renewal of the legislation which was in force before and at the time of the Confederation." And further "that the Ontario Legislature has a right to license or prohibit the sale of liquors in shops and taverns and in other places of the like kind, because it has the exclusive power over municipal institutions, and these institutions had before and at the time of Confederation the exercise of these powers, and because such power, read in connection with s. 92, sub-s. 16, of the Confederation Act, is now a matter of 'a merely local or private nature in the Province.' That power is in restraint of trade as well as a matter of police. The general regulation of trade and commerce, which is vested in the Dominion Government, must be considered to be modified by the powers which the Legislature of Ontario, acting in relation to municipal institutions, may properly exercise."

The same tribunal has also decided, in the case of *Slavin* v. *The Corporation of the Village of Orillia* (2), that "by-laws passed by municipal corporations wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses to nine, were valid as being within the power of the corporation under 32 Vict. c. 32, O., and that it was within the authority of the Provincial Legislature to confer such power."

[344] Like decisions have also been given in the cases *In re Thomas Arkell* and *The Corporation of the Town of St. Thomas* (3), and *In re Thomas Brodie* and *The Corporation of the Town of Bowmanville* (4).

The second question presents more difficulty.

[The remainder of the judgment is occupied with the consideration of the second point. The Chief Justice was of opinion that the intention of the Act was to make two distinct offences.

[CROSS and BABY, JJ., did not deliver any separate judgments.]

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(1) 36 U.C.Q.B. 183. (2) 36 U.C.Q.B. 159; *ante*, vol. 1, p. 688.
(3) 38 U.C.Q.B. 594. (4) 38 U.C.Q.B. 580.

SUPREME COURT OF CANADA.

THE QUEDDY RIVER DRIVING BOOM CO., AND HUGH R. ROBERTSON AND LAMBTON L. L. BEVAN ..... *Appellants*;

AND

WILLIAM DAVIDSON ..... *Respondent.*

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Feb. 26, 27;
May 1.

On Appeal from the Supreme Court of New Brunswick.

[*Reported 10 Can. S. C. R. 222.*]

Navigation and Shipping—45 Vict. c. 100 (N. B.)

A Provincial Legislature may incorporate a boom company, but cannot confer upon the company power to obstruct the navigation of a tidal and navigable river, (Taschereau, J., doubting). *McMillan* v. *South-West Boom Company* (1), overruled in part.

Appeal from a judgment of the Supreme Court of New Brunswick (2).

The plaintiff in this case filed a bill for an injunction to restrain the defendants from erecting and maintaining piers and booms in the Queddy River, and alleged that by erecting the said piers and booms and filling the stream with logs, the said plaintiff was prevented for a length of time from having access to the shore and using the stream for the purposes of navigation.

This coming on for argument on demurrer, it was [223] agreed that the only question that should be raised upon the argument should be the authority of the Provincial Legislature under the provisions of the B. N. A. Act,

* Present:—RITCHIE, C.J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

(1) 1 P. & B. 715; *ante*, vol 2, p. 542. (2) *Post*, p. 260.

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1867, to pass the Act incorporating the said Company, and to confer the powers contained therein, and that all other matters stand to the hearing; and for the purpose of raising the question relating to the said Act the following case was agreed upon between the counsel for the respective parties:—

"1. The plaintiff is the owner of certain lands situate at the outlet or mouth of the Queddy River, which empties into the Bay of Fundy. The said river is situate in the parish of St. Martins, County of St. John, in the Province of New Brunswick.

"2. The Queddy River is a public navigable river; the tide ebbs and flows for about a mile and a half from the mouth or outlet; and schooners or boats can, at the proper time of tide, go up to the head of the tide. The stream above the flow of the tide is and can only be used for floating and driving logs when the water permits.

"3. The rise and fall of the tide is about thirty feet, and at low tide the water is very low in the stream, almost dry, and vessels can only ascend it under and at certain states of the tide.

"4. The said river flows through the plaintiff's land for the distance of a mile from its mouth, he owning the shore on either side.

"5. The defendants, Robertson and Bevan, own or control lands at the head waters of the river adjacent thereto, from which they cut logs and drive them down the stream—the only practicable mode of getting them to market.

"6. The plaintiff also holds lands upon the said stream, from which, and also from his lands at the mouth of the river, he procures his supply of logs for the use of his mill hereinafter mentioned (1).

(1) [This paragraph, though printed in the case as prepared for the Supreme Court of Canada, is omitted in the report.]

"7. The defendants, the Queddy River Driving Boom Company, are a company incorporated by an Act passed at the last session of the Legislature of the Province of [224] New Brunswick, intituled 'An Act to incorporate the Queddy River Driving Boom Company' (1).

"8. In pursuance of and professing to act under the powers contained in the said Act, the said Company have erected and placed piers and booms in the said river attached to the shores at the places on map annexed hereto at the points marked *A*, *B*, *C*, *D*.

"9. These booms as erected under the Act impede navigation, but at the times when the tides serve they are capable of being swung open to admit rafts passing down or craft up stream.

"10. The plaintiff has erected a steam saw mill on his land at the point marked.

"11. Without booms being placed in the river at some point in the tide-way near the mouth, logs driven down the stream or a great portion thereof, would escape into the bay, and be practically lost and swept out to sea.

"12. The defendant company claim the right to erect the piers and booms as shewn on the plan, and maintain the same under the powers contained in the said Act, and that the said booms are erected there in accordance with the powers given by the said Act."

The questions for the opinion of the Court are:—

First, can the Legislature of the Province of New Brunswick give the powers claimed by the defendant Company under which they have erected and maintain the said piers and booms?

Second, are the acts done by the Company, as above set out, within the powers given by the said Act.

If these questions are answered in the affirmative, then

(1) 45 Vict. c. 100.

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judgment to be given for the defendants; but if in the negative, then the demurrer to be overruled.

"13. It is admitted that the plaintiff has sustained such special and particular damages by the operations of [225] the Company as would entitle him to an order of injunction restraining the proceedings of the Company and the other defendants if the above powers conferred by the Act of the Legislature of New Brunswick are *ultra vires*."

The Supreme Court of New Brunswick delivered judgment in favour of the plaintiff; and in reply to the first question declared that the powers conferred by the Act of the Legislature of New Brunswick upon the defendants authorizing them to erect piers and booms and maintain the same as stated in the special case are *ultra vires* and beyond the powers of the Legislature of the Province of New Brunswick; and as to the second question in the said special case declared it was unnecessary to answer it in view of the decision upon the first question.

Mr. *Weldon*, Q.C., for the appellants:

It is contended for the respondents that the legislation incorporating this company is *ultra vires* of the Legislature of New Brunswick, as being legislation indirectly controlling navigation and shipping.

It cannot be disputed that at first sight it would so seem, but it is submitted that it is not, but an exercise of a power necessarily vested in the Legislature to carry into effect the requisite legislation to incorporate this company, being a matter within the class over which it has legislation.

Legislation, whether of the Dominion or Provincial Legislatures, over certain classes or subjects falling within the classes respectively assigned them, in order to be effective must, in many cases, not only apparently but actually trench or infringe upon matters exclusively

assigned to the other Legislature, and the power to do this arises by necessary implication. The instance of bankruptcy and insolvency is perhaps the most familiar.

Applying the principle laid down by Sir Montague E. [226] Smith in delivering judgment in the case of *Cushing* v. *Dupuy* (1) to the classes assigned to provincial legislation it would seem to be a necessary implication that when it is necessary to render the legislation effective and of value and benefit to the people of the Province, or a portion of it, that it was intended to confer on it legislative power for that purpose, even if to some extent it apparently infringes upon classes of subjects exclusively assigned to the Dominion Parliament.

By the 10th sub-sect. of sect. 92, local works and undertakings, such as certain classes of railway, canal, telegraph and other works, are, upon the principle *mentio unius exclusio est alterius*, within the power of the Local Legislature.

Again, works of a local character, for instance, bridges to connect the great or bye-roads and to facilitate local communication through the Province and to open it up for settlement, it must be conceded are within the legislation of the provincial legislature. Many of these bridges necessarily cross rivers within the flow of the tide below the head of navigation; in fact many do, as may be instanced upon the rivers flowing into the bay of Fundy, such as the Musquash in the County of St. John, the Petitcodiac and Memramcook in the County of Westmoreland—over the latter not less than three bridges below the head of navigation. The bridges over the Shediac, Cocagne, Buctouche, Richibucto and Miramichi rivers, flowing into the Gulf of St. Lawrence, are all below the head of navigation, many of these erected since the union, and are constructed with draws to enable

(1) 5 App. Cas. 409; *ante*, vol. 1, p. 252.

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vessels to pass up and down, but necessarily to some extent interfere with the navigation. If the Local Legislature have no authority to authorize such an erection or bridge, then it would be illegal and a nuisance: *Hole* v. *Sittingbourne and Sheerness Railway Co.* (1).

[227] Angell on Watercourses (2). "All hindrances to navigation, whether by bridges or in any other manner, without direct authority from the Legislature, are public nuisances." See also *Original Hartlepool Collieries Co.* v. *Gibb* (3).

If in the course of navigation a vessel injured such bridge or boom, if illegal, no action would be maintainable: *Colchester (Mayor, &c.)* v. *Brooke* (4).

I submit that the legislation complained of by the respondent is legislation affecting property and civil rights, and falls within that class: *L'Union St. Jacques de Montreal* v. *Belisle* (5).

The judgment of the judicial committee of the Privy Council in the case of *Queen Ins. Co.* v. *Parsons* (6) supports the principle I am now contending for, and applying the rule there laid down, to ascertain the intention of the framers of the Act of Union, legislation of the provinces prior to the union is to be looked to. The legislation of the Province of New Brunswick on the subject will be found in the 3rd Vol. Public Statutes, under the head of Boom Companies.

While it may be contended that the relation of the Dominion to the Provinces is not in entire analogy to that of the United States with the respective States of the Union, yet it is only in the decisions of their courts we can find the question of conflict of legislation discussed, and the principles of constitutional law discussed and

(1) 6 H. & N, 488.
(2) Sec. 555, ed. 7.
(3) 5 Ch. D. 712.
(4) 7 Q. B. 339.
(5) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.
(6) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

expounded, and considering that from the same source as ourselves the common law of our mother country, the federal courts, and as a general rule the state courts, derive their principles of jurisprudence, and also taking into consideration the similarity of cirumstances in each federation, it may be fairly urged that even if their [228] decisions are not followed in their entirety, they may afford light and information upon these questions discussed before their courts.

In *Harrigan* v. *The Connecticut River Lumber Company* (1), the court illustrates the regulation of rivers even navigable as in the analogous case of highways. (See judgment delivered by Lord, J.)

After the decision in *Gibbons* v. *Ogden* (2), the question arose before the same judges in the case of *Wilson* v. *The Blackbird Creek Marsh Co.* (3), where the doctrine of the several rights of the Congress and the State is discussed by that eminent jurist Chief Justice Marshall; and subsequently in the Supreme Court of the United States in *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (4), where Chief Justice Taney delivered a dissenting opinion. See also *County of Mobile* v. *Kimball* (5).

Barker, Q.C., and *Tuck*, Q.C., for the respondent:—

The question involved in this appeal is whether the act of the Legislature of *New Brunswick*, 45 *Vict.*, c. 100, intituled "An Act to incorporate certain persons to be known as The Queddy River Driving and Boom Company," is *ultra vires*, so far as it authorizes the acts done by the Company in erecting booms and other works in the Queddy River, obstructing its navigation and preventing

(1) 129 Mass., 580.
(2) 9 Wheaton 1.
(3) 2 Peters 245.
(4) 13 Howard 518.
(5) 12 Otto 691.

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the respondent from having access to his lands fronting on the river. The powers conferred upon the company to which exception is taken will be found principally in sections 3 and 4 of the Act. (6) The construction of the works thus authorized, we contend must interfere with

(6) 45 Vict. c. 100, s. 4. "The said company are also hereby empowered and authorized from time to time during the continuance of this Act to put and place near the mouth of the said river, at such place or places as may be reasonably necessary, any piers and booms and things appertaining thereto and that may be necessary to sustain the same for the purpose of holding and keeping from being floated or driven against the will of the owner or owners thereof or of said company out to sea any such logs, timber or lumber as may be so floated or driven down said river as aforesaid; provided always, that any such piers and booms and things appertaining thereto and that may be necessary to sustain the same shall be so put, placed and maintained as not unavoidably to interfere with any mill or mills, or with any booms, piers, wharves, sluices, dams or other erections that are now or that may hereafter be erected at or near to the mouth of said river for the use of or in connection with any such mill or mills.

Sect. 5. "For the purpose of exercising the powers and privileges granted to the said company by the second, third and fourth sections of this Act, the said company shall have power and authority from time to time during the continuance of this Act, by their agents or workmen, to enter into and upon and hold and occupy for that purpose any land bordering on the said river or its tributaries or near to the mouth thereof that shall be necessary for the constructing, fastening, maintaining or operating the works or appliances which they are authorized to construct, place or maintain by virtue of the said last mentioned sections of this Act, doing no unnecessary damage to such land; provided always, that before the said company shall exercise the powers given them under and by virtue of the fourth section of this Act they will, with one good and substantial security to be approved of by the Recorder of the City of Saint John, enter into and deliver to the owner of the land a bond in the sum of $1,000, conditional that the obligors mentioned in the bond shall pay the amount of any award made under the sixth section of this Act in accordance with the terms of said sixth section and of the award; provided always also, that if there be more than one owner of any piece of said land, the delivery of the bond to any one of the said last mentioned owners shall be sufficient under the terms of this section of this Act, and if all the owners of any one piece of said land shall be out of the Province at the time of the executing any bond under this section, then it shall be sufficient to file the bond in the office of the Provincial Secretary, at which place any owner of any piece of land to which the bond refers for whom it may be intended shall be entitled to have the same on written application therefor; under the terms of this section of this Act the mortgagor or person entitled to the equity of redemption in the land shall be considered the owner."

the public right of navigation, and in reference to a [229] navigable river, such as the one in question, the Local Legislature has no power to confer the right professed to be given by this Act.

By sect 91. of the B. N. A. Act, the right to legislate on the subject of navigation and shipping is given to the Dominion Parliament; and if the powers conferred belong to any of the classes of subjects in sect. 91 of that Act, or are included in any of them, the Local Legislature has, to that extent, exceeded its powers, even though the Act may relate in other respects to some subject comprised within sect. 92. It is contended by the appellants that the Act in question relates solely to a local work and undertaking, and to matters of a merely local or private nature, and as such comes within sect. 92 of the B. N. A. Act. This contention cannot prevail. In the first place it cannot be said that the construction of works, which in their intended use necessarily take away or abridge a right in the public, such as that of navigation, is in any sense a matter of a merely private nature, and in the second place, any work or undertaking local in its nature ceases to be such in the sense in which the term is used in sect. 92 when its use or the result of its operation, is to interfere with any right which is included in a subject-matter within the legislative authority of the Dominion Parliament. For while the latter Parliament has, by force of the concluding clause of sect. 91, in addition to its express powers, such an implied legislative authority over the subjects mentioned in sect. 92 as may be requisite for complete legislation in reference to the subjects mentioned in sect. 91, there is no such implied authority in the Local Legislature in reference to the classes of subjects mentioned in sect. 91. Any such implied authority would obviously lead to conflict, and it is contended that except in the cases provided for by sects. 94 and 95 of [230]

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the B. N. A. Act, there is no concurrent power of legislation in the two Parliaments.

The cases decided by this and other Courts in reference to the powers of the respective Legislatures, so far as they bear on the subject under discussion, are as follows:—*City of Fredericton* v. *The Queen* (1); *Cushing* v. *Dupuy* (2); *Citizens' Ins. Co.* v. *Parsons* (3); *Russell* v. *The Queen* (4). See also *The Queen* v. *Burah* (5).

Admitting for the sake of argument that the Act in question *prima facie*, as Sir Montague Smith, in the *Citizens' Ins. Co.* v. *Parsons* (3), says, falls within one of the classes of subjects enumerated in sect. 92, does it not, or do not the powers conferred on the appellant company fall within the subject of navigation, inasmuch as they interfere with the public right in reference to it. If the Dominion Parliament enacted a statute simply authorizing *A* to enter upon and occupy the land of *B*, to his entire exclusion, it could scarcely be contended that this was not legislation as to the civil rights and property of *B*, and therefore *ultra vires* of that Parliament. Why? Not because it in words took away *B's* right of enjoying his own premises, but because that was the natural and necessary result of acting on the authority conferred. So in this case, the prevention of the public in the enjoyment of their right of navigation and its incidents, is the natural and necessary result of the use of the powers conferred. The legislation, therefore, does fall within the subject of navigation, and by all the authorities is void on that account.

The Dominion Parliament in its legislation has acted

(1) 3 Can. S. C. R. 505; *ante* vol. 2, p. 27.
(2) 5 App. Cas. 415; *ante* vol. 1, p. 252.
(3) 7 App. Cas. 96; *ante* vol. 1, p. 265.
(4) 7 App. Cas. 829; *ante* vol 2, p. 12.
(5) 3 App. Cas. 904; *post*, Appendix 1.

on the principle contended for by the respondent, and though this fact could in no way confer a right not given by the constitution, it is a question which, in such a [231] case as the present, "may," as Sir Montague Smith, at page 116 of the case last cited, says, "properly be considered." These statutes are numerous and refer, as will be seen, to almost every description of work which might interfere in any way with the rights of the public in navigable rivers. These statutes are as follows:—32-33 Vict. c. 42; 35 Vict. c. 94; 36 Vict. c. 65; 37 Vict. c. 29; 39 Vict. c. 15; 42 Vict. c. 9, s. 71; 43 Vict. c. 44; 43 Vict. c. 61; 43 Vict. c. 29, s. 2, art. 27.

The provision in the Act, sect. 22, that the works shall not unnecessarily interfere with navigation, admits that the right of navigation will necessarily be abridged, but beyond that it has no bearing on the case. Who is to judge the necessity, or how is it to be determined? Is it by the quantity of logs to be taken care of? If so, then it follows that if the quantity of logs to be boomed requires the whole river to be occupied by the company's works, the right of navigation is taken away altogether and necessarily so.

Then, it was argued in the Court below that at all events the legislation in question was good until some Act conflicting with it had been passed by the Dominion Parliament, and cases decided by Courts in the United States were cited in support of this contention.

Under the B. N. A. Act the only question that can arise is one simply of construction, and the power of either the Dominion Parliament or a Provincial one to legislate on any subject is defined and limited by the Act itself, and must be determined by the rules of construction applicable to any other case where the meaning of a statute is to be settled.

Weldon, Q.C., replied.

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Ritchie, C.J.

RITCHIE, C.J.:—

Piers and booms may be very useful on the Queddy [232] river, may, in fact, be almost essential for the preservation of logs driven down the river, to prevent their escaping into the bay and swept out to sea. But that cannot affect the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of New Brunswick, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters, It is not disputed that this legislation interfered with the navigation of the river, indeed this appears clearly from the language of the Act itself which says (1): "It shall be the duty of the said company to place and maintain all their works upon the said river in such a way as not to unnecessarily interfere with the navigation of the same."

I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B. N. A. Act. Thus, in addition to "navigation and shipping," generally, we have "beacons, buoys, lighthouses, and Sable Island;" then we have "quarantine, and the establishment and maintenance of marine hospitals;" and lastly we have in the list of provincial public works and properties which are to become the property of Canada, "canals with lands and water power connected therewith," "public harbours," "lighthouses and piers, and Sable Island," "steamboats, dredges and public vessels" and "rivers and lake improvements."

(1) 45 Vict. c. 100, s. 22.

All this seems to me to indicate very clearly that the words "navigation and shipping" are to be read in no restricted sense. The question of the interference with the navigation of public tidal waters is by no means matter of purely local or private concern, it affects the shipping of [233] the Dominion generally, as indeed also foreign as well as domestic; and, therefore, in view of the general scope of the Act, legitimately belongs to the Dominion Parliament rather than the Local Legislatures.

The objects of incorporation of companies with power to interrupt, impede, or abridge the rights of foreign or domestic shipping in the navigation of any of the tidal navigable waters of the Dominion cannot be said to be provincial any more than the works and undertakings under such powers can be called local; on the contrary, though the corporation may be private, the object to be accomplished affects the public as well within as without the Province.

But if the objects of the incorporation could strictly speaking be called provincial, or the works and undertakings local if thereby navigation and shipping, and the legislative powers conferred on the Dominion Parliament are interfered with, then by virtue of the latter clause of sect. 91, they are not to be matters coming within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces.

If the Provincial Legislature can authorize the obstruction of the navigable tidal waters at the mouth of the Queddy River, why may they not do the same at the mouth of the other large rivers of the Dominion, as in New Brunswick the mouth of the St. John, at the head of the St. John harbour, and so prevent or impede the free navigation of that great river by the numerous steamboats, wood boats and seagoing craft that daily navigate

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from the sea to St. John, and from St. John and Indian Town to Fredericton, or that large and important river Miramichi, navigated for miles from its mouth by sea-going ships to the towns of Chatham and Newcastle? [234] And if they have the right to interfere with and abridge the rights of navigation, why should they not be able to authorize total obstructions? for, if they can authorize partial obstructions, I can see no reason why they might not authorize obstructions which would render any navigation impossible, the question not being one of degree, but whether they can or cannot interfere at all.

And these views are, in my opinion, strictly in accordance with the principles heretofore enunciated in this court, and sustained by the Judicial Committee of the Privy Council.

I think, therefore, this appeal must be dismissed with costs.

STRONG, J.:—

There cannot, in my judgment, be any doubt as to the correctness of the decision of the court below, and I should have been prepared to have dismissed the appeal without hearing counsel for the respondent. The Queddy River is shewn to be a navigable tidal river, and the appellants have obstructed the navigation, and thus committed an act which is *prima facie* a public nuisance, and which the respondent shews to be specially injurious to him as a riparian proprietor. The respondent was therefore entitled to an injunction to restrain the continuance of the obstruction, unless the appellants were able to shew some legal justification for the interference with the navigation of the river, caused by the construction and maintenance of these booms. They, however, shew nothing but an Act of the Provincial Legislature of New Brunswick incorporating them as a Boom Company

(which so far was entirely within the powers of that Legislature), and which also assumed to confer power upon the company so incorporated to obstruct the [235] navigation of the Queddy River. The powers so conferred are, in my opinion, in excess of the authority given to Local Legislatures by the B. N. A. Act. This is a conclusion which requires no elaboration of argumentation for its demonstration, for no one can deny that by sub-sect. 10 of sect. 91 of the B. N. A. Act, exclusive power to legislate respecting navigation is conferred on the Parliament of Canada, and as little is it open to any one to dispute that this power respecting navigation includes the exclusive right to legislate so as to authorize an obstruction in a navigable public river where the tide ebbs and flows. A much less distinct power given by the United States Constitution to Congress to legislate respecting inter-state commerce, has, as is well known, been held to include the power to control the use of navigable waters on which inter-state commerce is carried on. And the powerful reasoning of the great judges who decided these cases, would, if there could be any doubt upon the point now presented, be conclusive in the present case.

Even if the provisions in sub-sect. 10 of sect. 91 had been omitted, I should have thought that the authority of the *Wheeling & Belmont Bridge Company Case* (1) would have been sufficient to shew that under sub-sect. 2, giving Parliament power to regulate trade and commerce, the Act of the New Brunswick Legislature in question here would have been an encroachment on these exclusive powers of the Dominion, and so void.

For these reasons, which are substantially the same as those assigned by the Chief Justice for the same conclu-

(1) 13 Howard 518.

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sion, I concur in the disposition of this appeal which has been proposed.

FOURNIER, J., concurred.

Strong, J.

[236] HENRY, J.:—

I entirely concur in the views expressed by the Chief Justice and my learned brother Strong. The Legislature of New Brunswick, of course, had the power to incorporate the company for a local object, but the question is raised here whether they had the right to confer on the company so incorporated the right to place obstructions in tidal navigable waters. My opinion is, that under the constitution they have no such right. If a Local Legislature could interfere to the extent of one quarter of a mile in tidal water, they might interfere to the extent of a mile, and there would be no limit. The maritime Provinces are so situated that the inhabitants on one side of the Bay of Fundy are entitled to navigate the other side, and *vice versa*. If one Province, therefore, had the right to interfere with navigable tidal waters they would interfere with the rights of the other Province. I do not undertake to say whether that power is inherent in the Dominion Parliament either. There may be cases even in which the Dominion Parliament could be restrained. There are certain rights of fisheries which are common, not only to the Province in which they are, but to all the British public and some foreigners, and if the right is conceded to a Province to interfere with navigable waters by allowing companies to place obstructions in them, they might largely interfere with rights outside of the Province altogether. I have no doubt the Local Legislature does not possess that power, it has only the power given to it under the Confederation Act, which gives them no power to interfere with tidal waters. The whole

power of the Local Legislature is shewn to be restricted. They have the power of organizing companies for local objects alone, but it must be taken into consideration that these local objects shall not interfere with public rights [237] outside. I consider, therefore, under all the circumstances of the case, that the Boom Co. had no authority by the Act to place obstructions in the place they did on this navigable river where the tide ebbed and flowed, and where parties were in the habit of taking vessels up and down. My judgment is to dismiss the appeal with costs, and to confirm the judgment that was given by the court below.

TASCHEREAU, J.:—

I will not dissent from the judgment of the majority of the Court, but I have great doubts on the question submitted. There are very strong grounds, it seems to me, in support of the contention that this boom is a local work or undertaking in the Province of New Brunswick. Navigation and shipping are left under the control of the Federal authority, it is true, but this, under sub-sect. 10 of sect. 92 of B. N. A. Act does not extend to, for instance, a line of steamers or other ships entirely within the Province, that is to say, plying from one part of the Province to another part of the same Province. That would, I presume, be a local undertaking under the control of the Local Legislature. May it not be said that the boom in question is also a local undertaking?

Can it be said that the incorporation of this company was for Federal objects? If it was for Provincial objects was it not legally incorporated by the New Brunswick Legislature?

GWYNNE, J., concurred with the Chief Justice.

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Palmer, J.

JUDGMENT OF PALMER, J. (*before whom the case came in the first instance*) (1).

PALMER, J. :—

This is a special case. The material facts as stated therein are as follows: That the Plaintiff is owner of lands on the shore of the Bay of Fundy, on both banks of a navigable river, called the Queddy River, flowing into it, in which the tide ebbs and flows for about a mile, and is navigated by vessels and boats when the tide is in, the plaintiff thereby having access to the shore of his land for the purpose of floating and landing logs and other timber there, and also of bringing vessels and unloading them there; in this state of things the defendant procured the passage of the Act of the General Assembly of New Brunswick, 45 Vict. c. 100, entitled "An Act to incorporate certain persons to be known as the Queddy River Driving and Boom Company;" and under powers claimed to be given by that Act, placed booms across the mouth of the said river, and then drove down the river large quantities of logs, which were held by the boom, filling the same up, thereby preventing the plaintiff from navigating into the river from the Bay and having access to his property by sea, or floating his logs and lumber from his land to the sea.

It was admitted by the defendant's counsel that the powers attempted to be given by the Act could not be exercised without substantially and injuriously interfering with the right of navigation as it before existed on the river; and so materially affected the plaintiff's means of access to his property, for the purposes aforesaid, sufficient to entitle him to have an injunction order to restrain such interference, if the New Brunswick Legislature had no power to authorize the Company to interfere with such navigation; and the counsel agreed that the only question that should be argued before me was whether, under such circumstances, that Legislature had such power. And I was to answer the two questions in the case: first, Could the Legislature of New Brunswick give the power claimed by the defendant's Company, under which they erected and maintained the booms? Second, Were the acts done by the Company within the powers given by the Act?

(1) [The judgment of Palmer, J. is taken from the appeal book printed for the hearing in the Supreme Court of Canada].

The admission of the counsel on the argument, that what the defendants claimed to have done, if authorized, is an abridgement of the public right to navigate public tidal waters of the Dominion, and although the Act provides by the 22nd sect. that the works authorized by it were to be placed so as not to unnecessarily interfere with the navigation ; yet as nothing could be done under the Act without so interfering, and if the works professed to be authorized by the Act are placed in the river, they will necessarily largely interfere with the navigation thereof, it follows, I think, that such Legislature has attempted to authorize the interference with, altering and abridging the public right of navigation in public tidal waters, and to some extent attempted to extinguish the public right of navigation therein. And the only question that remains is,—as was admitted on the argument,—Whether it has power to do so ? I have a clear opinion that it has not, and consequently that all parts of the Act that attempt to confer such powers on the Company are *ultra vires*, and to that extent void. The counsel having informed me that an appeal is to be taken from my decision to the Supreme Court of Canada, no matter how I decide, and both parties are anxious for a speedy judgment, I will give, shortly, some of the reasons for my opinion, not having time to go into the subject to the length that its importance would appear to require.

The short argument in favour of the plaintiff's contention is that as by the 91st sect. of the B. N. A. Act, sub-sect. 10, the Parliament of Canada is given exclusive power to legislate in relation to all matters coming within the subject of navigation and shipping ; and that they alone have such power, it being manifest that the taking away of the right to navigate from the public is a matter in relation to navigation.

The defendants' contention is that the Local Legislature is given exclusive power to legislate with reference to property and civil rights, also local works and undertakings, and also incorporation of companies with Provincial objects. With reference to property and civil rights it was admitted that if the subject came within any of the class of subjects enumerated in the 91st sect., then the Dominion Parliament would have exclusive power ; but it was contended that if it came within local works, etc , and in order to effectually legislate on that subject, it was necessary to legislate to some extent upon a subject mentioned in sect. 91, the Local Parliament could do so unless the Federal Parliament had itself passed Acts inconsistent with such legislation ; and it was further con-

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tended that the interference with navigation by a boom company, did not come within the meaning of the word navigation in the 10th sub-sect. referred to; and force was given to this contention by what was said by Chief Justice Allen in *McMillan* v. *The Southwest Boom Company*, (1).

As to sub-sect. 11 of sect. 92, "The incorporation of companies with Provincial objects": whenever powers were given to companies that do not belong to the subjects over which the provincial Parliament has power to legislate, it appears to me it cannot be said to be a company with provincial objects; when a company is given the right to take away the public right of navigation, if such be a Federal and not a provincial matter, I think such company is not a company having only Provincial objects, and therefore not within the 11th sub-sect. at all. The same answer may be given to the argument upon the 10th sub-sect. If powers are given, that do not belong to the Local Legislature to give, and the Federal alone can give, then it is not local, for the concluding clause of the 91st sect. enacts that any matter coming within any of the classes of subjects enumerated in this (the 91st) sect. shall not be deemed to come within any of the classes of matters of a local or private nature, comprised within the classes of subjects assigned exclusively to the Provincial Legislatures. Then the only question that remains is, does the right to legislate in relation to the public right of navigation in the navigable tidal waters of the Dominion come within any of the classes of subjects mentioned in sect. 91, and notably sub-sect. 10, the words of which are navigation and shipping? Surely when a Legislature attempts to abridge, alter or take away the public right of navigation, that is, when a right exists for the public to navigate ships over and upon navigable tidal waters, and that right is abridged, altered or taken away by a law made for that purpose, the making such law would be making a law in relation to navigation, and I should think shipping also.

To navigate is to pass by water, and the right to navigate, or of navigation, is the right to pass by water, and I cannot conceive a more certain exposition than to say, that when the right to pass by water is legislated away, that the law made for that purpose is a law in relation to navigation. I confess myself wholly unable to bring my mind to assent to the proposition of Chief Justice Allen in *McMillan* v. *The Southwest Boom Company*, (1)

(1) 1 P. and B. 715; *ante* vol. 2, p. 542.

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where he says that he is "inclined to think that the word 'navigation,' used in connection with 'shipping,' was not intended to have such a construction (to authorize the construction of booms); but, that it was used in the sense in which it is used in the several Acts of Parliament of Great Britain relating to 'navigation and shipping,' and in the Act of the Parliament of Canada, 31 Vict. cap. 58, namely, the right to prescribe rules and regulations for vessels navigating the waters of the Dominion." I cannot think the word has, or was intended to have, any such restricted meaning either in the B. N. A. Act or the Acts that he has referred to. It appears to me the 31 Vict. uses the word navigation in a wider sense, for Articles 21 and 22 relate to placing rafts in Sorel Harbour, which is the very subject of the legislation in contest in this suit; and it appears to be more than a mere right to prescribe rules and regulations for vessels navigating the waters of Canada, unless, forsooth, the keeping open of the navigation for the purpose of allowing such vessels to pass can be said to be prescribing such rules and regulations; for, if the meaning of the word was narrowed, so as only to mean the powers to make rules for navigating the navigable waters of the Dominion, and a person was desirous of running steamboats and other vessels between Newcastle and a point on the Miramichi river, above the Southwest Boom, and the Federal Parliament had the exclusive right to regulate how the vessels engaged should be navigated in that passage, if the Local Parliament by incorporating a Boom Company could take away such right of navigation by authorizing a boom across the river, and filling the river for miles with logs, this it appears to me would be entirely inconsistent with the power of the Federal Parliament so to regulate. This being my view, I do not think I ought to consider myself bound by what is stated in that case; it not being necessary for the decision of it, and therefore, *obiter dictum*. And as I know that it is intended to appeal this case to the Supreme Court of Canada, I think the parties are entitled to have my own opinion, although under other circumstances, I might hesitate to act on it, however strong, when opposed to the views of the learned Chief Justice, for whose opinions I have the most sincere respect.

It is claimed by the defendants' counsel that the Provincial Legislatures might exercise the powers mentioned in sect. 91, to some extent, when, as in this case, the matter comes within one of the subjects mentioned in sect. 92, that is to say, property and civil rights, until the Parliament of Canada had itself legislated on

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that subject, something in the same way as was decided in *Craig* v. *Kline*, (1) might be done by a State Legislature; but there is, I think, a marked distinction between our Constitution and that of the United States, not only in the respect pointed out by me in *The Queen* v. *The City of Fredericton*, (2) but also in reference to the way the power of legislation is granted in the respective cases by the American Constitution. Whatever power is in the Federal Legislature was granted by the States, they having the power so granted before: and I am not aware that words are used in the grant to shew that such powers were to be exclusively exercised by the Federal Legislature, and therefore such grants might not in all cases be construed to be an absolute prohibition of all power over the same subject by the State.

On this subject, Chief Justice Taney in the *License Cases*, (3) says: "It appears to me to be very clear that the mere grant of power to the General Government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject, by the States;" and on this principle it is that, in the case of *Craig* v. *Kline* (1), the Legislature of the State of Pennsylvania was allowed to interfere with the right of navigation; and the same learned Jurist, in the case of *Cooley* v. *The Board of Wardens of the Port of Philadelphia* (4), says: "The grant of power to regulate commerce is not exclusive; but, the question in each case depends upon the character of the subject; some requiring it to be exclusive, and others not so." (5) On the other hand, our Constitution being, in my opinion, the entire creation of the B. N. A. Act, neither Legislature has any power except what is conferred on it by that Act,—it follows that when power is claimed by either body, the grant of such power must be looked for by a fair construction of the Act itself, and in doing this each case must be decided as it arises by properly construing the language of the different sections of the Act, so as to reconcile the powers given to each Legislature, according to the intention as is expressed by every word in the Act. Under such a Statute, I cannot see how the fact that the Federal Parliament have or have not attempted to exercise

(1) 65 Penn. 399.
(2) 3 P. & B. 139.
(3) 5 Howard 504, 579.
(4) 12 Howard, 299.
(5) [The report in 12 Howard does not appear to contain the words quoted. The judgment of the majority of the Court, as there reported, is stated to have been delivered by Curtis, J.]

the powers exclusively given to it, could either authorize or prevent the Legislatures of the Provinces exercising any powers given to them. What I have to do is to say what power is given to each Legislature by the fair meaning of all the words used in the Act; and when it says that exclusive power is given to one body to legislate in relation to a particular subject, it is only common sense to say that the Imperial Parliament intended that the other body should have no power whatever to legislate on any matters that were fairly comprehended within that subject. It follows that when the Act says that the Parliament of Canada shall have exclusive power to legislate in relation to navigation—and all the cases shew, even including the American ones I have referred to, that enacting any law affecting the public right of navigation, or of passing over navigable waters, is legislating on that subject—that no other Legislature mentioned in the Act can legislate on the same subject, and therefore such legislation is *ultra vires* of the Local Legislature.

The demurrer therefore will be over-ruled, with costs.

ONTARIO COURT OF APPEAL.

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Sept. 14; Nov. 28.

PEEK *v.* SHIELDS.

On appeal from the Court of Common Pleas.

[*Reported 6 App. Rep. (Ont.) 639*].

Bankruptcy and Insolvency—Property and civil rights—38 Vict. c. 16, s. 136, D.

The Dominion Parliament, by its Insolvent Act of 1875, enacted that any person who purchased goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact with intent to defraud, and who does not afterwards pay the debt, shall be held guilty of a fraud and be liable to imprisonment for two years unless the debt and costs are sooner paid, provided that in the suit for the recovery of the debt, the defendant is charged with the fraud and declared guilty of it by the judgment rendered in the suit. The plaintiffs sued for goods sold and delivered to the defendants who afterwards became insolvent under the Act, and charged them with fraud in the terms of the Act.

Held by a majority of the Judges of the Common Pleas, by two Judges of the Court of Appeal, and by three Judges of the Supreme Court (the other three giving no opinion on this point), that the enactment is within the competence of the Dominion Parliament.

This was an appeal from the judgment of the Court of Common Pleas (1) in favour of the plaintiffs.

The appellants' reasons of appeal were, that the judgment of the Court of Common Pleas was erroneous, and ought to be reversed, for the following amongst other reasons:

*Present:—SPRAGGE, C.J.O. and BURTON, PATTERSON and MORRISON, JJ.A.

(1) 31 U. C. C. P. 112.

1. The alleged fraudulent act having been committed in another country, is not cognizable in the Courts of this Province if it is a crime, or even if it is a mere penal proceeding, inasmuch as the statute does not profess to include crimes committed outside of the Dominion of Canada.

2. If the alleged fraudulent act is not a crime, then sects. 136 and 137 of the Act are *ultra vires* of the Parliament of the Dominion, in that they assume to provide for [640] civil procedure in Provincial Courts, which is a matter within the exclusive jurisdiction of the Provincial Legislature.

The respondents' reasons against the appeal were, that the judgment of the Court of Common Pleas was not erroneous, and ought not to be reversed, for the following amongst other reasons:

1. Even if the fraudulent act complained of be a crime, it is cognizable in the Courts of this Province, even though it was committed in another country, the said Courts having had conferred upon them common law jurisdiction by the Imperial Parliament in 1792. The Imperial Parliament has power to enact that any offence against its laws, whether committed within or without its dominion, is a crime, and punishable according to its laws, whenever the offender is tried within its territorial limits (Maxwell on Statutes, pp. 119-122, 126-7), and the Imperial Parliament conferred upon the Dominion Parliament equal powers as to governing those resident in the Dominion. The Insolvent Act deals with "all creditors," barring their claims, and extending to them all the benefits of the Act, and thus does profess to include within its provisions offences by the insolvent against his creditors, whether such creditors be resident within or without the Dominion, if the redress be sought in the Courts of the Dominion against the insolvent, then within the jurisdiction of such Court.

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2. If the fraudulent act is not a crime, there seems to be no doubt it is *intra vires* of the Dominion of Canada to provide for civil procedure. In dealing with Dominion laws the Dominion Parliament does not recognise provincial limits; it enacts for the Dominion as a whole without territorial distinction, else the anomaly would exist of its being compelled to ask the several Local Legislatures to assist it in the administration of its own laws. See *Niagara Election Case* (1) and *Valin* v. *Langlois* (2).

[641] *Bethune*, Q.C., for the appellants.

J. E. Rose, Q.C., for the respondents.

SPRAGGE, C. J. O.:—

The plaintiffs sued in the Court of Common Pleas, under sect. 136 (3) of the Insolvent Act of 1875, to recover the value of two parcels of goods sold by the

(1) 29 U. C. C. P. 261.

(2) 5 App. Cas. 115; *ante* vol. 1, p. 158.

(3) Insolvent Act of 1875, 38 Vict. c. 16, s. 136: "Any person who for himself or for any firm, partnership or company of which he forms part, or as the manager, trustee, agent or employee of any person, firm, co-partnership or company, purchases goods on credit, or procures any advance in money, or procures the indorsement or acceptance of any negotiable paper without consideration, or induces any person to become security for him knowing or [having probable cause for, 40 Vict. c. 41, s. 30] believing himself or such person, firm, co-partnership or company for which he is acting to be unable to meet his or its engagements, and concealing the fact from the person thereby becoming his creditor with the intent to defraud such person or who by any false pretence obtains a term of credit for the payment of any advance or loan of money, or of the price or any part of the price of any goods, wares or merchandise, with intent to defraud the person thereby becoming his creditor, or the creditor of such person, firm, co-partnership or company, and who shall not afterwards have paid or caused to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid: Provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding."

plaintiffs to the defendants. The allegations in the second count of the declaration are sufficient to bring the case within the section which I have quoted. The third plea alleges that the contract out of which the alleged cause of action arose was made in the United Kingdom, and not within the Dominion of Canada. To this plea the plaintiff demurred; and upon the argument of the demurrer it was agreed that the pleadings should be amended by alleging that the defendants were traders and British subjects, resident and domiciled in the Dominion of Canada, at the time of the purchase of the goods in question, and subsequently became insolvent under the Insolvent Act of 1875, and amendments thereto. Judgment was given for the plaintiffs upon the demurrer by the majority of the Court, the learned Chief Justice dissenting. The defendants have since been allowed to plead that they have obtained their discharge.

The first question for the decision of the Court was, whether the statute makes the obtaining of goods by a trader afterwards becoming insolvent, under the circumstances stated in the declaration, a crime or offence, and the proceedings authorized by the statute criminal proceedings for its punishment. The second question was, as put by Mr. Justice Osler in his judgment, whether this proceeding is a matter of civil procedure, or connected with civil rights, and therefore *ultra vires* of the Dominion Legislature, or assuming that the Legislature had power to provide machinery for the administration of the Insolvent Act, as a means of distributing the estate of an [642] insolvent and giving or refusing him his discharge, they could give a creditor any additional remedy for the recovery of his debt.

The first question has been dealt with very elaborately in the judgment of Mr. Justice Osler, in which he has reviewed the cases bearing upon the point. I so entirely

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agree in the conclusion at which he has arrived, and in the reasoning by which he has reached that conclusion, that I feel that I cannot usefully add anything to the judgment which he has delivered.

The second question requires consideration. The B. N. A. Act assigns to the Provincial Legislature exclusive powers of legislation in a number of classes of subjects; among them "Property and Civil Rights in the Province," and "the Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts." Section 136 of the Insolvent Act does unquestionably touch and affect "Property and Civil Rights," and also procedure in a civil matter in the Courts of the Provinces; but among the powers of the Parliament of the Dominion we find legislation upon "Bankruptcy and Insolvency."

The observations of Sir Montague Smith, by whom the judgment of their Lordships was delivered in the Privy Council in the case of *Cushing* v. *Dupuy*, (1), are apposite to this point: "It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

"The answer to these objections is obvious. It would be impossible to advance a step in the construction of a [643] scheme for the administration of insolvent estates without interfering with and modifying some of the

(1) 5 App. Cas. 409, 415; *ante* vol. 1, p. 252.

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ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

In *Valin* v. *Langlois*, also in the Privy Council, reported in the same volume (1), where also the power of legislation by the Dominion Parliament was brought in question, Lord Selborne said, at p. 118: "It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character." I may be permitted to add my own view of the powers of the Dominion and Provincial Legislatures respectively in a case in the Court of Chancery: *Smith* v. *Merchants Bank* (2). "Legislation upon property and civil rights in the abstract is committed to the Provincial Legislatures; but where they are affected only by the legislation of the Dominion Parliament upon subjects upon which the Parliament has express authority to legislate it cannot be an invasion of the functions of the Provincial Legislature for the Parliament so to legislate. To hold otherwise would be to nullify the powers of Parliament, not only in its legislation upon the two subjects to which I have expressly referred, but upon many other subjects which are made expressly subjects of its jurisdiction; not [644] certainly less than one-half of the twenty-nine sub-

(1) 5 App. Cas. 115; *ante* vol. 1, p. 158.
(2) 28 Grant 629; *ante* vol. 1, p. 828.

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jects in which exclusive legislative authority is given to the Dominion Parliament."

In the *Niagara Election Case* (1), Chief Justice Wilson and Mr. Justice Gwynne, then in the Common Pleas, have very lucidly (if I may be permitted to say so) explained the relative powers of the Dominion and Provincial Legislatures. *Valin* v. *Langlois* (2), to which I have already referred, is in affirmance of this judgment of our Court of Common Pleas.

We must approach the consideration of this branch of the case before us, having regard to the principles enunciated in the two cases I have referred to in the Privy Council; but still if in our judgment the Dominion Parliament has in this matter exceeded the authority conferred upon it by the B. N. A. Act, it is our duty to say so, and to adjudge accordingly.

The power of legislation conferred upon the Dominion Legislature is comprehensive. After the general power conferred by sect. 91, it proceeds to give exclusive legislative authority, and says that it extends to all matters coming within the classes of subjects enumerated. So applying it to the subject matter in question, the authority conferred extends to all matters coming within the terms "Bankruptcy and Insolvency," or, as put in the earlier part of the section, in relation to all matters not coming within the classes of subjects assigned to the Provincial Legislatures, and therefore in relation to bankruptcy and insolvency.

It cannot, I conceive, be contended that any enactment by the Dominion Legislature making the same provision in respect to an insolvent and his dealings with creditors before assignment or attachment, as was at the date of the passing of the B. N. A. Act by an Act of the Imperial Parliament in force in England in respect to bankruptcy

(1) 29 U. C. C. P. 261. (2) 5 App. Cas. 115; *ante* vol. 1, p. 158.

before adjudication, would be *ultra vires*. I take this to be too clear for argument. The Act in force in England at that date was the Bankruptcy Act of 1861.

Our Insolvency Acts of 1864, 1869, and 1875, were [645] taken in a large measure from that Act, and it may be from subsequent Acts, but for the purpose of the position I am taking I confine myself to that Act. By the 10th clause of sect. 221, acts by a trader of a similar character to those defined by sect. 136 of our Act are dealt with. Section 221 makes it a misdemeanour punishable with imprisonment for the trader to do certain acts, one of these being by clause 10 defined thus: "If being a trader he shall, within three months next before the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any person, any goods or chattels with intent to defraud." It was competent to the Dominion Legislature in legislating upon bankruptcy or insolvency to make an enactment in the same or the like terms or as it has done, in the terms of sect. 136; and if it thought fit, to annex the same penal consequences to the commission of the act; but surely while dealing with the act it was not bound to annex to it the same penal consequences.

It was an enactment falling properly within the purview of a Bankruptcy or Insolvency Act, and provided for a case proper to be made an exception to the other cases of the contracting of debts by the insolvent. Can we say, in the face of the comprehensive terms in which power to legislate upon this subject is given to the Dominion Legislature, that it had not power to annex to the commission of this fraudulent act such penal consequences, or consequences not penal, as it might think fit? It was put in argument that the penalty prescribed by our Act is not a necessary incident to the winding up of the estate; that

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the money recovered does not go into the general estate; but the same may be said of the penal consequences attached to the like fraudulent act in England. And it may be asked who is made the judge of these things? Is it a Provincial Court or the Dominion Parliament?

Then can it be said that sect. 136 cannot be carried out without an unwarrantable interference with that which is [646] of the exclusive function of the Provincial Legislature. In my opinion it can. What are the real nature and effect of this provision? It deals with an insolvent who has been brought within the jurisdiction of a Court, the creation of the Dominion Parliament, and within the provisions of a law which places him as one of a class upon a different footing, as regards his property and his person, from others of the Queen's subjects. The Legislature had authority to say that as to debts fraudulently contracted, they should be dealt with in an exceptional manner; that as to them there should be no composition, but that they should be payable in full; and that as a punishment for the fraud he should be imprisoned for two years. The Legislature has not said quite all this, but still dealing with it as an exceptional case, because a case of fraud, it has provided more stringent means for its recovery than in the case of ordinary debts of the insolvent; and after all has dealt with it only as the Legislature of Ontario has dealt with fraudulent debtors outside of the Insolvent Act.

How then does this section interfere with that which is the exclusive function of the Province, its legislation in relation to property and civil rights? That has been disposed of beyond a question in the judgment that I have quoted of Sir Montague Smith. As to the Administration of Justice in the Province, it admits of a like answer, and this further, that only in so far as proceedings in insolvency are a part of the Administration of Justice does it inter-

fere at all, and as to that its power to interfere is given by the same authority as are the powers of Provincial Legislatures; and as to the constitution, maintenance, and organization of Provincial Courts, it does not interfere at all. Then does it interfere with Provincial legislation as to procedure in civil matters in those Courts? This admits of two answers—one that it only applies to and does not interfere with, the procedure in civil matters—not interfering at all with Provincial legislation upon that subject. The other answer is, that Insolvent Courts are not [647] Provincial, but Dominion Courts, constituted for the sole purpose of administering a law of the Dominion, and with power incident to their functions, to frame a procedure of their own or to adopt the procedure of Provincial Courts in civil matters. And I may here notice that Sir Montague Smith, in the passage that I have quoted from his judgment, refers repeatedly to interference with procedure as a power intended to be conferred upon the Dominion Legislature in matters of bankruptcy and insolvency, as well as power to interfere with property and civil rights.

It appears to me to be very clear from the language that I have quoted from the B. N. A. Act, that the Imperial Parliament intended to confer upon the Dominion Legislature full powers to legislate (*inter alia*) upon all matters in relation to bankruptcy and insolvency, whether such legislation should have the effect of interfering with property and civil rights, or the Administration of Justice, outside of the law relating to bankrupts and insolvents, or with procedure in civil matters, or not. To interpret the Act otherwise would cripple the Dominion Legislature in the exercise of its powers, where full powers are intended to be conveyed. In my judgement the proper construction of the B. N. A. Act necessarily leads to the conclusion that the power to pass such an enactment as sect. 136 was con-

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ferred upon the Dominion Parliament, and the provision of the bankruptcy laws in England, at that date, confirms me in that opinion. I should come to that conclusion independently of the cases in the Privy Council to which I have referred. Those cases give the sanction of the highest authority to the position that in my judgment is the correct one. I cannot assume that the Dominion Parliament would, under cover of a Bankrupt or Insolvent Act, make any enactment not fairly falling within the scope of those subjects. If it should do so, it would be a colourable Act; and if an invasion of the powers conferred upon the Provincial Legislature, the Courts of the Province would, I have no doubt, know how to deal with it.

[648] BURTON, J. A.:—

It was admitted on both sides, on the argument, that the broad question intended to be raised on this appeal was whether sect. 136 of the Insolvent Act applied in the case of a debtor, resident and domiciled in Ontario, contracting a debt in England under the circumstances referred to in that section as subjecting the debtor to imprisonment if found guilty of the fraud alleged, if it had been committed here—the debtor having subsequently become insolvent under the Act of 1875—and that any amendment necessary to raise that question should be made or considered as made.

Whilst differing with the Court below in the reasons given for their decision, I have arrived at the same result.

I differ from them in the view they take of the power of the Dominion Parliament to enact the section in question, which, for convenience, I will again repeat in substance.

Any person who purchases goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact from the person thereby becom-

ing his creditor with the intent to defraud such person, and who shall not afterwards have paid the debt so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid.

I think, for the reasons I shall presently give, this was clearly beyond the power of that Legislature to enact.

Apart from the observations of Sir Montague Smith, in delivering the judgment of the Privy Council in *Cushing* v. *Dupuy* (1), to which we were referred, I should have supposed it to be a self-evident proposition that, when the Imperial Parliament conferred upon the Legislature of the Dominion the exclusive power of dealing with bankruptcy and insolvency, it followed, as a necessary implication, that, so far as it was necessary for the working of any measure passed with that object, and for providing a procedure for the vesting, realization, and distribution of an insolvent's estate, that Legislature must have the power [649] to interfere with property and civil rights and procedure within the respective Provinces.

It does not appear to me to be safe to say that the Dominion Parliament would, under the powers given to them to deal with bankruptcy and insolvency, necessarily have authority to enact similar provisions to those to be found in the Bankrupt Act in England at the time of the passing of the B. N. A. Act. The Imperial Parliament having power to deal generally with all subjects, and having power to deal with the criminal law, no question could possibly arise there, although the enactment might deal with matters not coming strictly within the scope of a law relating to bankruptcy; but assume for the moment that the criminal law had been placed under the exclusive jurisdiction of the Provincial Legislature, I should suppose

(1) 5 App. Cas. 409; *ante* vol. 1, p. 252.

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it to be too clear for argument that the Dominion Parliament would have been confined to the enactment of such provisions as would secure the realization and equal distribution of the insolvent's estate, with power, no doubt, to punish fraudulent conduct on the part of the insolvent by the withholding of his discharge, but that it would be clearly in excess of their powers to declare any violation of its provisions or any fraudulent or dishonest conduct of the insolvent a felony or misdemeanour punishable by imprisonment in the Provincial Penitentiary.

The Provincial Legislature would, in the case I have supposed, have the exclusive power to say whether certain acts, declared by the Insolvent Act of the Dominion to be fraudulent and such as would be sufficient to prevent the insolvent from obtaining his discharge, should also be made criminal offences subjecting him to the risk of being indicted and tried for them as a criminal.

The Dominion Parliament has power, however, to deal with the criminal as well as the insolvent laws, and therefore one is not surprised to find that they have in many respects followed the Imperial legislation on a similar subject, and declared many things to be misdemeanours which are also misdemeanors in the English Act.

[650] I may say, however, that no such enactment as sect. 136 is to be found in the Imperial Act; it is as regards bankruptcy proceedings, *sui generis*, and I may add seems opposed to and inconsistent with the generally entertained idea of a Bankruptcy Act, the general scope and object of which is to secure an equal distribution of the debtor's effects among the creditors.

I have nothing to say against the policy of a law which punishes with imprisonment for a certain time, or until compensation is made to the creditor, a debtor who, having reason to believe that he is unable to meet his engagements, and concealing the fact from his creditor, obtains

credit with intent to defraud; but there is no special reason why that should apply to an insolvent in the legal sense of the term more than to any other person who thus fraudulently contracts a debt and then refuses to pay; and it seems to me, therefore, to be a matter not only not within the general scope of an Act for the administration of an insolvent's estate, but opposed to the spirit of such an enactment. It is in point of fact providing an additional remedy to the creditor so defrauded for the recovery of his debt, and so comes exclusively within the power of the Provincial Legislature.

The Legislature of Canada did, it is true, before confederation, by the Act of 1864, pass a similar clause, but it was then clothed with plenary powers, not restricted as the Dominion Parliament now is to legislate upon certain subjects, and no analogy therefore is to be drawn, any more than from the Imperial legislation, from their having exercised such a power. Whether it was a matter of bankruptcy law or a matter of procedure in the Courts of law, that Legislature had equally power to deal with it.

And that seems to me to be the crucial test in this case. If it was a mere matter of procedure in the practice of the Courts of common law, the Dominion Parliament, dealing with the question as an original piece of legislation, would have no power to enact it, and as a consequence no power to repeal the section which the Parliament of the Province of Canada had thought fit to enact. [651] If, on the contrary, it is a subject which comes properly within a scheme for the realization and distribution of an insolvent estate, then the Dominion Parliament had power to repeal the section in the former Act, and to enact it either in its original shape, or with such modifications or amendments as they might think proper.

I agree with the observations of Mr. Justice Osler as to the desirability of embracing in any bankruptcy law, not

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only a scheme for dividing the debtor's estate, but for punishing dishonesty, and think it was a wise provision to vest in the same Legislature the power to enact a bankruptcy law, and to deal exclusively with the criminal law. They thus possess the power to declare certain acts to be misdemeanours in addition to the punishing the debtor by withholding his discharge, a power which they unquestionably have under the general power of dealing with bankruptcy.

The Legislature of the Dominion has, in the Act in question, declared certain acts to be misdemeanours, and they have drawn a distinction between those cases and that we are now considering. In cases of this description, they have not made it a misdemeanour, but have contented themselves with declaring that if the creditor sues in the common law Courts of the Province for such a claim, and succeeds in establishing fraud, the creditor shall have an additional remedy for the recovery of his debt; that is to say, imprisonment for such a limited term as the Judge directs, unless the debt and costs be sooner paid.

I do not at all question the dictum attributed to the Chief Justice of the Supreme Court, in *Valin* v. *Langlois* (1) on the contrary, it has my hearty concurrence—that nothing contained in sub-sect. 14 of sect. 92 of the B. N. A. Act interferes with or restricts the right or power of the Dominion Parliament to direct the mode of procedure to be adopted in those cases in which that Parliament has jurisdiction, and where it is exclusively authorized to deal with the subject matter.

[652] The Insolvent Act has provided a machinery for carrying out its provisions, and has made this the final Court of Appeal by parties aggrieved from the decisions of the Judges of first instance.

The Provincial Legislature under the powers conferred

(1) 3 Can. S. C. R. 1; *ante* vol. 1, p. 167.

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upon them under sub-sect. 14 of sect. 92, wide as they appear to be, could not of course make any alteration in the constitution of these Courts, or in the procedure prescribed in the Insolvent Act; but the Dominion Legislature are equally precluded from interfering with the procedure in the Courts which are not under their jurisdiction.

The plaintiff here is not proving upon the estate or taking any proceedings in the Insolvent Court, but is suing in one of the Provincial Courts. According to the procedure of that Court, he is entitled after recovery of judgment to imprison the debtor in certain cases, but as at present advised, the local Legislature has exclusive power to say upon what terms and in what cases he shall exercise the right to imprison the debtor.

I do not see upon what pretence this can be said to come within the general scope and scheme of a Bankruptcy Act. To my mind, it is entirely inconsistent with and opposed to the principles of that kind of legislation, the aim and object of such a law being to secure the assets of the debtor for the general body of creditors.

On a prosecution for any of the matters declared to be criminal offences under the Act, it would be competent for the Judge to suspend sentence with a view to the restoration by the criminal of the property withdrawn from the estate, but the provision in question has no such object in view, but attempts to secure to the particular creditor defrauded an additional remedy, and is foreign to the scheme of an insolvent law, and an usurpation by the Dominion Legislature of a power to deal with a subject exclusively within the jurisdiction of the local authorities.

But the same reasons which preclude the Dominion Parliament from enacting such a clause apply with equal force when we consider their right to repeal the section in [653] the Act of the old Parliament of Canada. I think

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that section is still in force, and possibly applies to any person, whether an insolvent or not. The proceedings are not alleged to be under that Act, but I understood the parties to desire our opinion upon the question generally, and to consent to any amendment which might be necessary.

We have in this view to consider Chief Justice Wilson's objection, that although not a crime, still if a penal proceeding, the remedy could not be invoked in favour of this creditor, because the fraud, if any, was committed outside the limits of the Province.

If this be so, it is rather an alarming state of things, but whilst fully conceding the rule enunciated by him that one country cannot legislate so as to make that legislation binding on another country, I fail to see its application in the present case.

It does not, so far as the matter we are discussing is concerned, become material to consider where the debt was contracted. The alleged fraud does not affect the contract in the sense of making it invalid. When it was entered into it was uncertain where it would be enforced —but all parties knew that wherever it was enforced the laws of that country would regulate the remedy. The creditor has to follow the debtor, and must sue him generally where he resides, and although the *lex loci contractus* may be referred to for the purpose of expounding the contract, the rules of evidence, of prescription, and of practice, will be those of the country where the remedy is being sought. Having to submit to these, which it may be are more disadvantageous than those of his own country, he is also entitled to such benefits as that law gives him, or as the matter is better stated by Lord Tenderden, in *De La Vega* v. *Vianna*, (1): "A person suing in this country must take the law as he finds it; he

(1) 1 B. & Ad. 284, 288.

cannot, by virtue of any regulation of his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

[654] In the Act for the relief of insolvent debtors passed by the late Parliament of Canada, and which provided for the discharge upon certain terms of persons confined for debt, is to be found a provision of this nature:

"In case it appear to the Court that the debt for which such debtor is confined, was contracted by any manner of fraud or breach of trust, or under false pretences, or that such debtor wilfully contracted the debt without having had at the same time a reasonable assurance of being able to pay or discharge the same, or that he is confined by reason of any judgment in an action for breach of promise of marriage, seduction, etc., the Court may order the applicant to be recommitted to close custody for any period not exceeding twelve months."

Here no option appears to be reserved to the debtor to get rid of the imprisonment by payment of the debt, and yet it has never been suggested that if the seduction occurred in a foreign country, or the fraud was there committed, that the Court could not make the order for committal.

I think it is a mere matter of procedure; the defendant is a Canadian subject, not a stranger coming into the country and accidentally sued here, although I think that circumstance would make no difference—the plaintiff is here the stranger seeking his remedy in our Courts, and is entitled to the same remedies as the inhabitants of this Province.

I think, therefore, the appeal should be dismissed, with costs.

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PATTERSON, J. A.:—

The plaintiffs sue upon the money counts, and charge that the defendants have been guilty of fraud, within the meaning of the Insolvent Act of 1875, by purchasing from the plaintiffs, on credit, the goods for the price of which the action is brought, knowing or having probable cause for believing themselves to be unable to meet their engagements, and concealing that fact from the plaintiffs with the intent to defraud the plaintiffs; and they aver [655] that the term of credit has elapsed, and that defendants have not paid or caused to be paid the debt so incurred.

The third plea of the defendant Shields alleges that the contract, out of which the cause of action arose, was made in England and not within the Dominion of Canada.

It is agreed that these pleadings are to be treated as amended by alleging that the defendants were traders and British subjects, resident and domiciled in the Dominion of Canada, at the time of the purchase of the goods, and subsequently became insolvents under the Insolvent Act of 1875.

The memorandum of this agreement does not specify which of the added allegations are supposed to belong to the declaration and which to the plea. We may treat them all as belonging to the declaration. They are intended to complete the facts necessary, under sect. 136, to establish against the defendants the charge of fraud, and the liability to "imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid."

The plea is evidently bad as in no way answering the action for the debt, but almost in terms confessing it. It is addressed not to the debt, but to the charge of fraud, which it also admits, raising only the question whether such a fraud, committed in England, can be punished

under sect. 136, notwithstanding that it was committed by a trader resident and domiciled in Canada, subject to the laws of the Dominion, having, after the commission of the fraud, been adjudged an insolvent under our statute, and who, when he committed the fraud, knew or had probable cause for believing himself unable to meet his engagements.

The plea has apparently been treated as pleaded only to the latter part of the declaration, and it ought properly to have been so amended as to confine it to that part.

There are no formal exceptions to the declaration; but, upon the demurrer to the plea the whole question has been dealt with, including the power of the Parliament of Canada to pass sect. 136 of the Act, and the construc-[656] tion of that section as applying only to frauds committed within the Dominion, or to frauds wherever committed. The questions have in fact been argued as upon a case stated, without the more regular method of stating a case being adopted. Upon the first of these questions, I agree with the opinion arrived at by the majority of the Court below, from which I do not understand the Chief Justice, who dissented upon the second question, to differ, that the law formulated in sect. 136 is the law of this Province, although I may reach that conclusion by a somewhat different route.

The B. N. A. Act gave to the Parliament of Canada legislative jurisdiction over the subject of bankruptcy and insolvency, and also over the subject of criminal law.

It would, beyond question, have been within that jurisdiction to punish as a crime the fraud described in sect. 136; and if an enactment of that effect had been embodied in the Insolvent Act, it would have, in that particular, resembled several clauses in the Imperial Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, as *e. g.*, sect. 205, which made forgery of certain documents, &c., felony, and sect. 221,

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which made any one of a long list of acts a misdemeanour, if done by a bankrupt.

But I entirely agree with Mr. Justice Osler, in the reasoning by which he shews that sect. 136 is not to be regarded as an addition to our criminal law, but as a matter of procedure, or a mode of enforcing payment of the debt. At the same time I desire not to be understood to intimate any doubt of the propriety of regarding it, as the Chief Justice did for the purpose of his judgment in the Court below, as a penal proceeding to be enforced by or in a civil action.

I think we are scarcely at liberty to make the ordinary limits or the leading objects of bankruptcy law, the test of the binding effect of the law of sect. 136.

We must remember that we had, in the Province of Canada, the Insolvent Act of 1864, which was in force [657] when the confederation of the Provinces took place, and that sub-sects. 7 and 8 of sect. 8 of that Act were essentially the same as sects. 136 and 137 of the Act of 1875.

Those very provisions therefore existed, at least in the present Provinces of Ontario and Quebec, as part of the insolvent law, when the subject was assigned to the jurisdiction of the Parliament of Canada. This would, as it strikes me, afford a strong, if not an unanswerable reason for holding, in this Province at all events, that the re-enactment of the law as it stood, or of such parts of it as the Parliament thought proper to re-enact, was *intra vires*. But it hardly becomes necessary to decide that question; because, if the subject of sect. 136 were outside of the subject of insolvency, it would seem to follow that the Parliament had no power to repeal that portion of the Act of 1864, and that consequently sub-sects. 7 and 8 of sect. 8 are still in force. Thus the rule of law formulated by sect. 136, whether it derives its force from the Act of 1875, or from that of 1864, must be the law of this Province.

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Then as to the question raised by the plea. I have been impressed by the force of the reasons given by the Chief Justice in the Court below for holding that the proceeding under sect. 136 is a penal proceeding, and a punishment for the fraud, even though not in its form a criminal proceeding; and that it can only apply to offences committed in this country. I have not, however, been convinced that we ought on that ground to reverse the judgment appealed from. It is certain that the Act treats the proceeding as a means of enforcing payment of the debt, as well as punitive in its character, In this respect also sect. 63 agrees with sub-sect. 5 of sect 9 of the Act of 1864, when it refers to debts fraudulently contracted as debts "for enforcing the payment of which the imprisonment of the debtor is permitted by this Act." Having regard to this circumstance, and to the fact that the debtor in this case, being domiciled in the Dominion, and in this Pro-
[658] vince of the Dominion, as I think we may assume from his being sued here for a debt contracted abroad, was subject to our laws when he contracted the debt, and knew the mode provided by our law for enforcing payment of a debt contracted as this one was, I do not see my way to holding with sufficient clearness to justify the reversal of the judgment of the majority of the Court below, that he can escape from the direct effect of the enactment by reason of his fraud having been committed out of the Dominion.

I therefore agree, though with some hesitation upon the last point, that we should dismiss the appeal, with costs.

MORRISON, J.A., concurred with SPRAGGE, C.J.O. (1).

(1) [The judgment of the Court of Appeal was affirmed in the Supreme Court in May, 1883 (8 Can. S. C. R. 579). In giving judgment Ritchie, C. J., says, at p. 590: "I cannot doubt that sects. 136 and 137 of the Insolvent Act of 1875 are *intra vires* of the Dominion Parliament." And at p. 591: "As to this being matter of civil procedure and *ultra vires* as

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interfering with property and civil rights, what I have stated in *Valin* v. *Langlois* (3 Can. S. C. R. 1; *ante*, vol. 1, p. 158), is an answer to this objection. The right to direct the procedure in civil matters in the provincial courts has reference to the procedure in matters over which the Provincial Legislature has power to give them jurisdiction, and does not in any way interfere with or restrict the right or power of the Dominion Parliament to direct the mode of procedure to be adopted in cases in which the Dominion Parliament has jurisdiction, and where it has exclusive authority to deal with the subject matter, as it has with the subject of bankruptcy and insolvency. This is also the view taken by the Privy Council in the case of *Cushing* v. *Dupuy* (5 App. Cas. 409; *ante*, vol. 1, p. 252). I will only add that I am quite prepared to adopt the conclusion arrived at by the Court of Appeal, and to say that such a provision as the one in question comes fairly within the general scope of any law relating to bankruptcy or insolvency."

Strong, J., said, p. 593: "The view which I take of this case does not make it necessary to decide the constitutional question as to the power of Parliament to pass such an enactment as that in question, limited to the territory of the Dominion, the opinion at which I have arrived being formed exclusively on the construction of the clause in question. I may say, however, that I have heard nothing to raise a doubt in my mind as to the constitutional validity of such an enactment (provided it is construed, as hereafter to be stated, as limited to the territory of the Dominion) under one or other of the powers conferred on Parliament by the B. N. A. Act of legislation as to criminal law, bankruptcy and insolvency, or trade and commerce, and even if this view is incorrect, and the provision in question cannot be considered a proper exercise of any of these powers of legislating, the opinion of Mr. Justice Burton must then be correct, and the similar clause in the Insolvent Act of 1865 be held to be still in force."

Fournier, J., said, p. 598: "I believe the enactment of 136th clause is clearly within the powers of the Federal Government, which has unlimited power to legislate upon the matter of insolvency."

Henry, Taschereau and Gwynne, J.J., did not express any opinion on the constitutional question.]

ONTARIO COURT OF APPEAL.

MONKHOUSE *v.* THE GRAND TRUNK RAILWAY COMPANY. 1883

[*Reported 8 App. Rep. (Ont.) 637.*] *Jan. 23; Oct. 6.*

Dominion railway—B. N. A. Act, s. 92, sub-s. 10—44 V. c. 22, O.

The Province of Ontario passed an Act to make provision for the safety of railway employees and the public, such provision having reference to the construction and maintenance of railway frogs, etc. Per Spragge, C.J., a Provincial Legislature has no power to pass such a law with reference to a Dominion Railway situate locally within the Province. (The other Judges of the Court of Appeal expressed no opinion upon the point, being of opinion that the Act was not intended to apply to Dominion Railways, and for that reason did not apply to the Dominion Railway Co. in question.)

This was an appeal by the defendants from the judgment pronounced at the trial by Osler, J., directing a verdict to be entered for the plaintiff for $1,100, with costs of suit.

The action was brought by the next friend of the plaintiff, who was a minor, a servant of the company, alleging that the plaintiff,

"Being a railway servant, on, etc., within this Province, to wit, etc., personal injury was caused to him whilst in the employment of the defendants, a railway company, owned and operated by them in this Province, by reason of the space between the rails in a railway frog forming part of such railway, extending from the point of such frog backward to where the heads of such rails are not less than five inches apart, not being at all times after

Present:—SPRAGGE, C. J. O., HAGARTY, C. J., Q. B. and BURTON and PATTERSON, JJ.A.

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the lapse of three months from the passing of 'The Railway Accidents Act,' 1881, 44 Vict. c. 22 (O.) and particularly on the date hereinbefore specified, filled in with packing; and that the default occasioning the personal injury hereinbefore stated arose from the negligence of the defendants whose servant the plaintiff then was, and was not occasioned by the plaintiff's own act, omission or negligence." [Claiming $3,000 damages.]

The defendants, amongst other grounds of defence, set up that—

"They are a corporation created by the Legislature of the United Province of Canada before the passing of the B. N. A. Act, and that their railway extends through two or more Provinces of the Dominion of Canada, and that they are under and subject in all respects and in all matters relating to their railway to the jurisdiction and authority of the Dominion Legislature, and not to the [638] jurisdiction or authority of the Legislature of the Province of Ontario, and that the said Act in the statement of claim mentioned was, as therein mentioned, passed by the said Legislature of the Province of Ontario, and not the Parliament of the Dominion of Canada, and that the Act only purports to apply to every railway and railway company, in respect of which the Legislature of Ontario has authority to enact such provisions respectively, and the defendants say that for the reasons above stated the Legislature of Ontario has, and had, when said Act was passed, no authority to enact such provisions respecting the railway of the defendants as in said Act contained, and as are mentioned in said statement of claim, and the defendants say the said Act does not and was not intended to apply to them or their railway."

The case came on for trial at the Toronto Winter Assizes, 1882, without a jury, when evidence was given clearly establishing the fact of the injury sustained by

the plaintiff, and that he was still unable to work, and would continue to be so for some time.

The learned judge at the conclusion of the evidence made the following note or memorandum of his findings:

"I find an Act of the Legislature of Ontario by which the defendants are directed to pack the frogs, and the accident has occurred entirely by reason of the defendants' wilful disregard of this direction. The defendants do not propose to accept my decision as final; and therefore, although my impression is that the Act in question is *ultra vires*, I shall, for the purposes of the trial, and the Judicature Act to the contrary notwithstanding, treat the Act as in force. The damages I assess at $1,400; [639] and I direct judgment for the plaintiff for that sum, with costs of suit, to be entered after the next sittings of the Court of Appeal."

Bethune, Q. C., for the appeal.

Mulock, contra.

The grounds of appeal shortly were, that the defendants' company were not subject to the provisions of the Act of the Ontario Legislature in question: that the Act itself was *ultra vires*.

SPRAGGE, C.J.O.:—

This case lies within a very narrow compass. The short question is, whether the Act of the Legislature of Ontario, under which this action is brought, applies to the Grand Trunk Railway Co. The question assumes this shape because the Act itself, in terms, applies only "to every railway and railway company in respect of which the Legislature of Ontario has authority to enact such provisions;" and the inquiry is, whether the Provincial Legislature had authority to apply the provision of the

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Act under which the action is brought to the defendants. The solution of the question lies in the interpretation proper to be put upon sections 91 and 92 of the B. N. A. Act.

These sections have been so much considered, as well in the Privy Council as in the Supreme Court and the Courts of this and other Provinces of the Dominion, that it would be superfluous to examine any portions of them except those which bear directly upon the point in question. It will be convenient, adopting the principle of construction pointed out in *Russell* v. *The Queen*, (1) as the proper one, to take the first question to be determined to be, whether the Act, if applied to the defendants' com-[640] pany, falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces.

It would be a nice question whether it does not fall within the subject of "civil rights in the Provinces," if the question rested there—if the subject dealt with by the Provincial Act be not, if applied to the defendants' company, assigned by the B. N. A. Act to the Dominion Parliament.

The first part of the Imperial Act to be referred to is No. 10, with its exceptions, in section 92. No. 10 assigns to the legislation of the Provincial Legislatures, "local works and undertakings," other than those of three classes which are excepted. The first of these excepted classes is, "*a.* Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province." It is indisputable that the Grand Trunk Railway of Canada falls within this excepted class.

Turning then to the introductory part of section 91 we

(1) 7 App. Cas. 829, 836; *ante* vol. 2, p. 12.

find it enacted that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say." Then follows the enumeration of subjects twenty-nine in all, and the last of these, No. 29, is "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It appears to me that the excepted class (*a*) is by number 29 of section 91, as distinctly assigned to the exclusive legislation of the Parliament of Canada, as are "the regulation of trade and commerce," the "postal service" or any other of the classes of subjects enumerated in section 91. The only other question, if it admits of question, is whether the Provincial Act under which this action is brought would be if applied to the defendants' company, in contravention of the legislative authority [641] assigned to the Parliament of Canada. There is no room to contend that the legislative authority is concurrent, for the language of the Act is "*exclusive* legislative authority." A fair test of the legislative authority of the Provinces would be to try it by an Act applied in terms to the defendants' company. Take the title to this Act and its recital, *mutatis mutandis*, it would read thus: "An Act to make provision for the safety of the employees of the Grand Trunk Railway Company of Canada and the public." "Whereas, frequent accidents to railway servants and others are occasioned by the neglect of the Grand Trunk Railway Company to provide a fair and reasonable measure of protection against their occurrence." Take this, followed by such enactments in relation to the Grand Trunk Railway as are contained in this Act, it would be palpably legislation in relation to a matter, in relation to which legislative authority is assigned *exclusively* to the Parliament of Canada.

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I agree in much of the ingenious argument that has been addressed to us by Mr. Mulock; but, as he bases the plaintiff's case upon provincial legislation, and I apprehend necessarily so bases it, he being a servant of the defendants' company, it must, for the reasons that I have given in my judgment, fail.

The appeal should, in my opinion, be allowed. If the learned Judge whose judgment is appealed from had given a judgment in accordance with his individual opinion, it would, in my opinion, have been proper to affirm it.

BURTON, J.A.:—

I agree in thinking that the Ontario Act was intended to apply to those railways only which, under sub-section 10 of section 92, are placed under their jurisdiction, viz.: those lying wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. That being so, the point which was mainly argued before us does not necessarily arise for [642] adjudication, and I abstain from offering any opinion upon it.

On the short ground I have mentioned I think the appeal should be allowed, with costs.

PATTERSON, J.A.:—

I have only a few words to add to what has been said by his Lordship the Chief Justice, because I agree with him and the other members of the Court that the appeal must be allowed.

The statute in question, 44 Vict. c. 22, has been spoken of as *ultra vires* of the Ontario Legislature. Whether it is so or not depends upon the interpretation which is put upon it. It professes, in section 2, to apply its provisions

to "every railway and railway company in respect of which the Legislature of Ontario has authority to enact such provisions respectively."

Reading this literally, no question of *vires* can arise. Neither can such a question be reasonably suggested if the enactment is understood to relate to those railways only to which the legislative authority of the Province is restricted by the exception contained in the 10th article of section 92 of the B. N. A. Act, coupled with the 29th article of section 91. But if it can be taken to contemplate all railways in the Province, it may well be asked if jurisdiction to pass the Act existed.

I do not see that the Act can be properly read except in one of two ways: either as intended to govern all railways in the Province, or as confined to those which are not covered by the exception in article 10. To attempt to construe it more literally would, in my judgment, be to treat it as so uncertain as to destroy its value as a piece of practical legislation. Violation of its mandates or prohibitions would be punishable by indictment; and it cannot be assumed that the Legislature intended to throw upon any company the task and the risk of deciding whether it was, or was not, aimed at as one with respect to which there was authority to enact all or any one of the provisions of the Act. There must be some criterion, capable of being precisely stated, which the Legislature [643] must be supposed to have had in view. The language employed in the second section shews that all railways were not aimed at, while the limited class is not indicated in any other way than by the general reference to the legislative jurisdiction. I think the only way to give a practical construction to this is, to understand it as referring to the terms of the B. N. A. Act, and thus as intended to affect only those railways over which the Legislature, under the 10th article of section 92, had ex-

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clusive jurisdiction, because situated wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

I wish to guard myself from being understood to hold that a railway company incorporated under the laws of the Dominion, or coming within the exceptions in the 10th article, may not be affected by provincial legislation touching property and civil rights, or other subjects within the jurisdiction of the Provincial Legislatures. I merely hold that this statute, which relates to the management and in some respects to the construction of railways, and deals only with railways as such, applies only to a class which does not include the company which is defendant in this action.

HAGARTY, C. J., concurred.

ONTARIO COURT OF APPEAL.

DOYLE *v.* BELL.

1884*
December 18.

On appeal from the Court of Common Pleas.

[*Reported 11 App. Rep. (Ont.) 326.*]

Dominion Election Law—Penalties—Property and Civil Rights.

The jurisdiction of the Provincial Legislatures over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election.

The Dominion Elections Act, 1874, by sect. 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's courts in the Province in which the cause of action arose, having competent jurisdiction :

Held, that this enactment was valid.

This was an appeal from a judgment of the Court of Common Pleas (1), refusing to disturb a verdict recovered by the plaintiff in an action for penalties under the Dominion Elections Act, 1874, 37 Vict. c. 9.

The statement of claim alleged that the plaintiff was a farmer residing in the township of Charlotteville, etc., and the defendant an hotel keeper residing in the village of Port Dover.

On the 20th day of June, 1882, an election was held in the electoral district of the South Riding of the County of Norfolk, for choosing a member to serve in Parliament for the said electoral district, pursuant to the statutes in that behalf.

* Present:—HAGARTY, C.J.O., PATTERSON and MORRISON, JJ.A., and ROSE, J.

(1) 32 U. C. C. P. 632; *post* p. 309.

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STATEMENT.

The defendant offered and promised moneys to one James Burgess, a person entitled to vote at said election, in order to induce him to refrain from voting at said election, contrary to the Dominion Elections Act, 1874.

The defendant thereby became liable to forfeit the sum of $200 to the plaintiff, who sues the defendant for the same in this action, pursuant to the said statute.

The statement of claim also alleged similar offers and promises made by defendant to J. B. Evans, William Boughner, and John Payne, persons entitled to vote at such election, etc., and claiming the several penalties of $200 therefor.

The defendant, by his statement of defence, denied the allegations in the statement of claim.

He further alleged that, from before the commencement of the said election, until after the said election was ended, and during the times within which the acts in the statement of claim referred to are charged to have been done by the defendant, the defendant was of unsound mind, to such a degree as to be unable to distinguish between right and wrong.

The cause was tried before Burton, J.A., with a jury, at Simcoe, at the Fall Assizes of 1882.

The finding was that the defendant had offered or promised money to two of the persons named in the statement of claim, to induce them to refrain from voting, upon which a verdict was entered for the plaintiff, with the penalty in each case of $200 (1).

H. J. Scott, Q. C., for the appellant.

Osler, Q. C., for the respondent.

HAGARTY, C.J.O.:—

I think this appeal should be dismissed, and the judg-

(1) The statement here given is taken from the Report in the Common Pleas, 32 U. C. C. P. 632.

ment of the Common Pleas affirmed, for the reasons given by that Court.

In the argument before us a very wide proposition was advanced as governing this case, viz: that the Dominion Parliament could not pass any Act by which an action of debt, or anything in the nature of a civil proceeding at suit of an individual in our Courts for the recovery or enforcement of a penalty was created: that "civil rights" were exclusively within the jurisdiction of the Local Legislatures, and that the creation or enforcement of a liability like the present trenched upon that exclusive jurisdiction.

If this be correct, the Dominion Parliament is powerless to create or enforce any civil liability to penalty or to damages in civil proceedings in Provincial Courts over the wide field of their legislation on the numerous subjects entrusted to their exclusive jurisdiction, such as the regulation of trade and commerce, navigation and shipping, banking, customs and excise, weights and measures, bills of exchange and notes, bankruptcy and insolvency, patents, copyright, and many others.

They cannot enact that there can be any pecuniary penalty recoverable by one person against another for a violation of anything ordered or prohibited, or that an action will lie, or damages be recoverable, for infringement of a patent or copyright, or that lands can be expropriated for public works, or any other right or privilege which they have the exclusive right to grant or confer.

I am wholly unprepared to assent to any proposition so startling, or so destructive to the due and necessary exercise of the legislative functions of the general government. I cannot see how, in discussing legislative powers as to "civil rights," it can be in any way necessary to argue that the right to enforce a penalty at suit of an

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individual, touches the admittedly exclusive right of our Legislature over "property and civil rights in the Province."

It can hardly be said that it is a civil right in the defendant to commit bribery, but it is argued that a civil right is involved in making him liable therefor to pay money to another person in a civil action. I think this is a strained and unnatural construction.

It was urged by Mr. Scott in his very able argument that granting the right of Parliament to make all necessary provisions to enforce purity of election, they could have fully effected such purpose by their undoubted right to enforce it by the Criminal Law, that they might legally effect the same object by information at suit of the Attorney-General, and therefore there was no reason for their conferring the right to sue on an individual.

I think their right to do as they have done here cannot be measured by our view of the necessity of such a proceeding. Such a power existed at and before confederation. I do not believe there is anything in the Confederation Act limiting their power on such a subject.

I am also of opinion that, granted the existence of the power to impose the penalty, it can be properly recoverable in our Courts.

Nor do I see any encroachment on the subject of civil procedure. An action of debt for a penalty seems still to be brought in our Courts under local statutes. We had one before us within the last two months, and such actions are so described in our local election law (1).

It is unnecessary to discuss the right of our Legislature to alter or prescribe a new form or course of procedure in our Courts for the recovery of penalties.

The general subject of the right of Parliament to deal with subjects specially allotted to them by the Federa-

(1) *Garrett* v. *Roberts*, 10 App. Rep. 650.

tion Act, and to enforce their enactments by civil as well as criminal proceedings in the Provincial Courts, is very fully discussed in *Valin* v. *Langlois* (1).

I think the appeal must be dismissed.

Hagarty, C.J.O.

PATTERSON, J.A.:—

The Dominion Elections Act, 1874, by sect. 92, declares that any person offending against the provisions in that section made against bribery shall be guilty of a misdemeanour, and shall also be liable to forfeit the sum of $200 to any person who shall sue for the same, with full costs of suit. Sect. 109 provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's courts in the Province in which the cause of action arose, having competent jurisdiction; and, in default of payment of the amount which the offender is condemned to pay, within the period fixed by the court, the offender shall be imprisoned in the common gaol of the place for any term less than two years, unless such fine and costs be sooner paid. Then sect. 110 contains some rules of pleading or procedure "in any action or suit given by this Act." Sect. 111 declares that "in any such civil action, suit or proceeding as last aforesaid, the parties to the same, and the husbands or wives of such parties respectively, shall be competent and compellable to give evidence to the same extent, and subject to the same exceptions, as in other civil suits in the same Province; but such evidence shall not thereafter be used in any indictment or criminal proceeding under this Act against the party or person giving it"; and sects. 114, 115 and 116 contain further

(1) 3 Can. S. C. R. 1; 5 App. Cas. 115; *ante* vol. 1, p. 158.

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provisions on the subject of pleading and evidence in these actions.

This action is brought to recover several sums of $200 each, for as many offences alleged to have been committed by the defendant against the provisions of sect. 92. The plaintiff recovered a verdict and judgment for two penalties of $200 each, with full costs of suit.

This appeal is from the refusal of the Court of Common Pleas to disturb the verdict or the judgment.

The only question which has been argued before us is the very important one of the legislative jurisdiction of the Parliament of Canada.

The contention on the part of the defendant is that, in giving an action to an informer to recover the penalty in a civil action, the Parliament has overstepped the jurisdiction conferred upon it by the B. N. A. Act.

One argument in support of this contention was based upon the existence, in sect. 109 and the sections following it to which I have alluded, of provisions touching procedure and evidence in civil actions. It was urged that this was a clear violation of the division No. 14 of sect. 92 of the B. N. A. Act, which places amongst the classes of subjects, in relation to which the Provincial Legislature is given exclusive power to make laws, procedure in civil matters in the Provincial Courts.

This position struck me as being a formidable one, and I still think so. The action to recover a penalty by an informer is clearly a civil action, and not a criminal proceeding. That was solemnly decided more than a century ago in *Atcheson* v. *Everitt* (1), which was an action of the character of the present action, to recover a penalty for bribery, under 2 Geo. II. c. 24, s. 7; and this quality of the action is expressly recognised in the words which I have just read from sect. 111.

(1) 1 Cowp. 382.

But when we look attentively at the proceedings before us, it is apparent that the objection founded on sect. 109 and the later sections does not properly arise for decision.

The plaintiff's statement of complaint does not contain the allegations authorized by sect. 110, "that the defendant is indebted to him," etc.; the action does not purport to be an "action of debt or information"; and I gather from the judgment of the learned Judge who tried the action (1) that he did not act upon the evidence which sect. 115 assumes to make sufficient, but required and received other evidence of the writ and return. I notice also that he gave judgment only for the amount of the verdict and costs, without imposing any term of imprisonment under sect. 109.

There is nothing before us, either in the form of the action, or the conduct of it, or the judgment, which requires support from anything beyond what is found in sect. 92. That section declares the offender liable to forfeit the sum of $200 to any person who shall sue for the same, with full costs of suit; and the plaintiff states his cause of action in those terms, and asks for nothing more than that section entitles him to ask.

The technical aspect of the question, which we thus get rid of, may hereafter require consideration in some action for penalties which are not given to the informer except by force of sect. 109; such, *e. g.*, as those imposed by sects. 47, 72, 84, and 91, and perhaps others. At present we have to deal with the broader inquiry whether the jurisdiction of the Provincial Legislature over "property and civil rights in the Province," assigned to it by division No. 13 of sect. 92 of the B. N. A. Act, excludes the power of the Parliament of Canada to give the right to an informer to recover, by a civil action, a penalty imposed as a punishment for bribery at an election.

(1) 32 U.C.C.P. p. 633; *post* p. 313.

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I do not think this subject has been so directly touched by any of the decisions upon the B. N. A. Act as to relieve us from the duty of considering it on principle.

Any argument founded upon the inevitable interference with property and civil rights by the parliament, in the exercise of its exclusive legislative authority over the large class of subjects enumerated in sect. 91, seems to me entirely beside the present discussion; and, without venturing an opinion as to how far civil rights, created by Dominion legislation, ought to be left for their enforcement to the remedies and procedure provided by the Provincial Courts under Provincial laws, or how far such remedies and procedure may be prescribed by parliament, I think the fullest power in connection with such matters might be conceded to the parliament, without necessarily involving the right to give a civil action to a private individual as a mode of punishing an offence.

The two subjects have, to my apprehension, no analogy.

We are indebted to Mr. Scott for the citation of all the cases in which questions under the B. N. A. Act, at all resembling those now raised, have been discussed.

One important decision which is relied on for the plaintiff is *Valin* v. *Langlois* (1). We have a series of able and exhaustive judgments delivered by the Judges of the Supreme Court, to which it would be instructive to refer; but I prefer to confine my attention to that of the Judicial Committee, delivered by Lord Selborne, not because it adds materially to the others, but because the matter is presented in one judgment only. The subject of the decision was the power of the Parliament of Canada to commit the trial of election petitions to Provincial Courts. That power was affirmed on distinct grounds which I need not stay to notice. The decision did not involve any question similar to that now raised. The question was

(1) 3 Can. S. C. R. 1; 5 App. Cas. 115; *ante*, vol. 1, p. 158.

the jurisdiction to deal in the mode adopted with the general subject of the trial of controverted elections. Part of the reasoning of the Lord Chancellor was founded on the 41st section of the B. N. A. Act, which declared that until the Parliament of Canada should otherwise provide, all laws in force in the several provinces at the union, relative to certain specified matters, should respectively apply to elections of members to serve in the House of Commons for the same several provinces. If this reasoning bears at all on the present controversy, it is capable of being appealed to by the defendant, because the matters specified do not include the punishment of corrupt practices; and Mr. Scott did so use sect. 41 in his argument before us. On the whole, I do not regard the case of *Valin* v. *Langlois* (1), as very directly aiding us at present.

I think the same observation may be made with respect to the other decisions upon the Act, without stopping to particularize them, with the exception of *Hodge* v. *The Queen* (2). The principles laid down in that case respecting the construction of the power given the Provincial Legislatures, by No. 15 of sect. 92, to impose punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in that section, are, in my opinion, applicable in the present case.

"Under these very general terms, 'the imposition of punishment by imprisonment for enforcing any law,'" it was said by Sir Barnes Peacock, "it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it 'hard labour;' in other words, that 'imprisonment' there means restraint by confinement in

(1) 3 Can. S. C. R. 1; 5 App. Cas. 115; *ante*, vol. 1, p. 158.
(2) 9 App. Cas. 117; *ante*, p. 144.

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a prison with or without its usual accompaniment, 'hard labour.'"

The prevention of corrupt practices at elections is a necessary incident of the power to regulate the mode of election of Members of Parliament. The legislative jurisdiction of the Dominion Parliament with respect to election of members of that body is beyond dispute. One exercise of that jurisdiction was the subject of the contest in *Valin* v. *Langlois* (1). The forfeiture of money to be sued for and recovered by an informer, with full costs of suit, as a punishment for bribery at elections, has, ever since the passing of 2 Geo. II. c. 24, more than 150 years ago, been part of the system of legislation on this subject in England. It was so in this Province before confederation, and, as far as we are informed, was so in the other confederated Provinces.

We have in these considerations abundant reason for regarding the provision as a recognised if not an absolutely necessary incident of the authority to deal with the subject of elections, and one which can reasonably be assumed to have been in the contemplation of the Imperial Legislature as accompanying the right given, whether by express terms or by necessary implication, to the several Provinces and to the Dominion respectively, to regulate the election of members of their respective legislatures.

Mr. Scott urged with force and with truth that penalties of this class, inasmuch as they differ from ordinary punishment for crimes by being placed beyond the control of the Crown and removed out of the reach of the leniency which, in proper cases, is extended to persons who may have broken some law, are of a different class from those of the criminal law, which is specially assigned to the Dominion Legislature. This consideration would

(1) 5 App. Cas. 115; *ante* vol. 1, p. 158.

have weight if it were necessary, in order to support the jurisdiction, to treat the punishment in question as an ordinary punishment for crime. But when the power to award the punishment is found, not in the jurisdiction over crimes as such, but in the authority to legislate concerning the conduct of elections, the argument loses its force. The question becomes one of policy rather than of legislative jurisdiction.

But after all it may be questionable whether the creation of this right of action is properly to be regarded as an interference with property or civil rights in the province.

I do not propose to enter upon a discussion of the meaning or extent of those words as used in sect. 92. For our present purpose it is unnecessary to do so.

We have now the assistance of several decisions of the Privy Council, in which the duty is enforced of reading the B. N. A. Act, and particularly these sects. 91 and 92, as embodying a scheme of general legislation, and not to be construed in a narrow sense or without reading one part of the Act or the section with another. Amongst these decisions are: *L'Union St. Jacques de Montreal* v. *Belisle* (1); *Dow* v. *Black* (2); *Citizens Ins. Co.* v. *Parsons* (3); *Russell* v. *The Queen* (4); *Valin* v. *Langlois* (5); *Hodge* v. *The Queen* (6).

The principle of these decisions requires us to be cautious before treating as an encroachment upon the legislative jurisdiction over property and civil rights, every enactment by which a right or a liability cognizable in a civil court is created.

(1) L. R. 6 P. C. 31; *ante* vol. 1, p. 63.
(2) L. R. 6 P. C. 272; *ante* vol. 1, p. 95.
(3) 7 App. Cas. 96; *ante* vol. 1, p. 265.
(4) 7 App. Cas. 829; *ante* vol. 2, p. 12.
(5) 5 App. Cas. 115; *ante* vol. 1, p. 158.
(6) 9 App. Cas. 117; *ante* p. 144.

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I agree that it is proper to dismiss the appeal, with costs.

MORRISON, J. A., concurred.

ROSE, J.:—

It clearly appearing from the decisions in *Valin* v. *Langlois* (1) and *Peak* v. *Shields* (2), and cases therein referred to, that, as to subjects within the exclusive jurisdiction of the Dominion Parliament, such Parliament has the power to make such enactments as are necessary, whether the same interfere with civil rights or not, and also the power to provide all necessary procedure to be adopted to enforce such rights; and it further appearing that Local Legislatures have the right to prescribe procedure in civil matters only in respect of such matters as, by the B. N. A. Act, were placed under the exclusive control of the Local Legislatures, Mr. Scott was driven to argue that the clause providing for recovery of a penalty, as sued for in this action, was not the exercise of a *necessary* power, and hence *ultra vires* the Dominion Parliament.

I do not understand by the use of the word necessary, as found in various decisions and text books, that it is meant to lay down the doctrine that, to bring within the powers of the Dominion Legislature any provision of an enactment respecting a subject within the exclusive jurisdiction of such Legislature, and which provision might affect civil rights, it must necessarily appear that, without such provision, it would be *impossible* to carry into effect the intentions of the Legislature, or that probably no other provision would be adequate. On the contrary, it seems to me that if such provision might, under certain circumstances, be beneficial and assist to more fully en-

(1) 3 Can. S. C. R. 1; *ante*, vol. 1, p. 158. (2) 8 Can. S. C. R. 579; *ante*, p. 266.

force such legislation, then it must, at all events, on an appeal to the courts, be held to be necessary in certain events. Surely the Legislature must be allowed some, and in my opinion a very wide, discretion as to the mode of enforcing its own enactments. It cannot be that the courts are to sit in judgment on the exercise of such discretion, so as to be able to dictate to the Legislature whether they shall adopt this or that mode, because in the opinion of the courts our mode is the more convenient or better, or at least as well adapted to effect the purpose of the Legislature.

It was not contended before us that the provision in question might not be beneficial. It was contended, however, that criminal proceedings might accomplish the same purpose.

When it appeared that a similar provision is to be found in the legislation on this subject prior to confederation, also in the legislation on the same subject in other Provinces and in Great Britain, it seemed to me the argument as to want of necessity failed. The evidence to the contrary is too clear and strong to enable the court to interfere. I certainly cannot take upon myself to declare unnecessary what so many Legislatures have declared necessary.

I agree that the appeal must be dismissed.

JUDGMENT OF THE COURT OF COMMON PLEAS.

[*Reported 32 U. C. C. P. 632.*]

WILSON, C. J.—

[637] There was a plea that the defendant was so intoxicated he did not know what he was about at the time and on the occasions as charged by the plaintiff. The motion was directed against the evidence, etc., in so far as they related to the trial of that issue.

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The Court intimated their opinion that upon the evidence they could not properly interfere with the verdict upon any of the grounds stated in the motion, and it was not much relied upon.

The constitutional objections taken are, as I understand them, that the Dominion Parliament had not, and has not, the power to alter the provisions of the 23 Vict. c. 17, s. 1, repealing the Con. Stat. C. c. 6, s. 83, and that the 37 Vict. c. 9, s. 92, D., so far as it does alter them is void; and that objection I understand to be based upon the Confederation Act, sect. 41, which, it is said, restricts the interference of the Dominion Parliament in all matters concerning their own elections to such particular subjects as are mentioned in that section.

The enactment in the Act of 1860 is exactly the same as the enactment of sect. 92 of the Act of 1874. By the Con. Stat. C. c. 6, s. 83, the penalty is declared to be not less than $20 nor more than $200 in the discretion of the Court. The penalty is, therefore, different from that contained in the Act of 1860, and so also is the penalty, which between the limits before mentioned was placed in the discretion of the Court.

The Act of 1860 and such provisions of the Con. Stat. C. c. 6 that had not been varied by the Act of 1860, contained the law [638] which was in force respecting such election matters at the time of confederation, and among those provisions not altered by the Act of 1860 were the amount of penalty before stated, and the amount of it between the limits last mentioned being placed in the discretion of the Court.

As to these two points of difference, then, between the Consolidated Act and the Act of 1874, why could the law not be altered by the Act of 1874?

It is said because the Confederation Act, sect. 41, does not mention these particular matters, and the Dominion Parliament cannot go beyond the matters expressed in that section.

The section enacts that "Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the union relative to the following matters, or any of them, namely: . . shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces."

Such an enactment cannot possibly be read as limiting the legislation of the Dominion Parliament to the particular matters enumerated in it. It is as plain as language can make it that these enumerated matters were to remain in force until the Parliament of

Canada otherwise provided. It does not say that the Dominion Parliament shall not have power to legislate on any other matters relating to elections than those which were to remain in force only for a temporary purpose.

The argument that the Dominion Parliament had not the power to pass the Election Act of 1874 is one of the extremest instances of the attempt to apply the doctrine of *ultra vires* and unconstitutionality.

The other objection is that sect 109 of the Act of 1874 directs that penalties imposed by it should be recovered by a civil action—by action of debt or information ; and it is contended the Dominion Parliament had no power to give such a remedy, because matters of civil procedure are by sect. 92, No. 14, of the Confederation Act vested exclusively in the Provincial Legislatures. The *Niagara Election Case* (1) disposed of that objection.

I did not quite understand whether Mr. Bethune argued [639] that the Dominion Parliament could give no civil remedy whatever, or that it could not prescribe the form of that civil remedy.

There can be no objection to the Parliament imposing a penalty for a particular infraction of the election law without saying by what means it shall be recovered, and in such a case a civil action will lie for it, under the former law by an action of debt, and under the present law by the ordinary remedy for the recovery of money. So in dealing with assaults, what objection can there be to the Dominion Parliament providing that, in certain specified cases, the remedy shall not be by criminal procedure, but by a civil action for damages. Such enactments would not be an assumption of legislation beyond the power of the Dominion Parliament. They would not be an interference with the civil procedure in the "Provincial Courts." They would be an express submission to the jurisdiction of such Courts.

If, in addition, in the last case of the supposed assault, the Parliament enacted that, in respect of it, the complainant might adopt the civil remedy of trespass, it would not in my opinion be an encroachment upon the civil procedure in the Provincial Courts.

The enactment in question provides that the remedy in such a case as the present shall be by action of debt or information.

As I have said, I did not understand whether it was that the Act of 1874 had appointed the particular form of remedy by action of

(1) 29 U. C. C. P. 261.

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debt or information, or because a civil remedy in any form had been given, which formed the ground of objection. In the latter case, we see no kind of objection in such legislation, and in the former, when the particular kind of remedy is named, we think the objection is in no way strengthened. The action of debt or proceedings by way of information were well known civil remedies in our Courts at the time the Act was passed, and we see no objection, as the Provincial Legislature has altered the form of proceeding in [640] all civil actions but in a few excepted cases—and this kind of remedy is not within the exceptions—that the plaintiff may adopt the new form of action in place of the former one.

This last objection was not taken on the argument, if any effect could be given to it, and we do not think there could be.

The Act of 1874, sect. 110, declares it shall be sufficient for the plaintiff to state in his declaration that the defendant is indebted to the plaintiff in the sum demanded, and to allege the particular offence for which the action is brought, and that the defendant has acted contrary to the statute.

The plaintiff has expressly stated the last two particulars, but not expressly the one that the defendant is indebted to him in the sum demanded, unless that is sufficiently done by the allegation "whereby the defendant became entitled to recover the sum of $200" in each of the paragraphs of claim, and I think that may be held to be a sufficient averment of indebtedness. If it be not, an amendment in that respect will, of course, be allowed.

The second constitutional objection to the recovery in this action, we think, fails also.

The learned Judge who tried the action has not, under the Act of 1874, sect. 109, fixed the period within which the offender is to pay the amount he has been condemned to pay, nor has he fixed the period of imprisonment the offender is to suffer in the common gaol in case of non-payment of the amount he has been condemned to pay, unless such fine and costs be sooner paid. That must, of course, be done.

We discharge the motion, with costs.

GALT and OSLER, JJ., concurred.

JUDGMENT OF BURTON, J.A., AT THE TRIAL.

[*Reported 32 U. C. C. P. 633.*]

BURTON, J.A. :—

Burton, J.A.

[633] The point was taken that the Dominion Legislature had no power to define what should be evidence, but it was urged that, apart from the statute, evidence was receivable of the fact of the election being held, and I gave permission to supply whatever might be necessary ; and, since the trial, what purports to be a copy of the writ and the returning officer's return have been put in.

The point was further taken, but was not argued, that the Dominion Legislature, so far as it professed to give a right of suit to an informer to sue for a penalty by action of debt, was *ultra vires.*

I should not, under any circumstances, even if I had been aided by argument, have assumed to decide the point when sitting at *nisi prius;* but I cannot avoid expressing the opinion that the question is sufficiently doubtful to warrant action on the part of the Provincial Legislature in aid of that of the Dominion, for it is certainly desirable that this very salutary check upon corrupt practices should be preserved.

I do not for a moment doubt the power of the Dominion Parliament to direct the mode of procedure to be adopted in election [634] cases over which that Parliament has jurisdiction, and with which it is exclusively authorized and empowered to deal ; and it would have the right, therefore, to interfere with property and civil rights in so far as such interference might be necessary for the purpose of legislating generally, and effectually on these subjects. The right to deal with the Dominion elections being vested in it by sect. 41 of the B. N. A. Act, and the criminal law being also vested in it, that Parliament has clearly the power to regulate the mode of elections, and the trial of controverted elections, and to make corrupt practices misdemeanours. This last power is, however, derived from their having control over the criminal law. Were it otherwise, if, for instance, the criminal law was vested exclusively in the Provinces, their powers would be confined to the regulation of elections, and the trial of controverted elections and the proceedings incidental thereto.

The granting the privilege to any one to sue for a debt is, as it appears to me, purely a civil right, not necessarily incident to election proceedings any more than the right to make a corrupt practice a misdemeanour would be.

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It may be well, also, to note in this connection that the 41st section, which continues existing laws until altered by the Dominion, enumerates the matters which the Dominion Legislature may alter, but makes no reference to those clauses relating to actions for penalties. If, however, the Dominion Parliament has no power to legislate on such a subject, neither had it power to repeal the existing laws, and, although that point was not presented, it is quite possible that the action is maintainable under the statutes in force at the time of confederation.

I give judgment for the plaintiff for the amount recovered, and full costs.

[CHANCERY DIVISION.]

Re Wetherell and Jones.

1883
Sept. 15.

[*Reported 4 Ontario Reports 713.*]

Taking evidence to be used in foreign tribunals—B. N. A. Act s. 92, *sub-ss.* 13, 14, 16—31 *Vict. c.* 76 (*D.*)

The taking of evidence to be used in an action pending in a foreign tribunal is of extra Provincial pertinence, and does not fall within the exclusive legislative authority of the Provinces; the Dominion Act 31 Vict. c. 76 providing for the taking of such evidence by Provincial Courts was therefore held to be valid (1).

In this case the plaintiff obtained an order from Proudfoot, J., under 31 Vict. c. 76, (D) for the examination of certain witnesses resident in Ontario, under a commission and letters rogatory from the Circuit Court of Cook County, Illinois.

On September 7th, 1883, the witnesses moved before the learned Judge to rescind his order, taking the ground that the Act in question, which was his only authority for making such an order, was *ultra vires*. The learned Judge refused the order asked, and the matter then came up by way of appeal to the Divisional Court on September 12th, 1883.

Wallace Nesbitt for the appellants. The Act in question comes within sect. 92, sub-sects. 13 and 14 of the B. N. A. Act, under which civil rights in the Province and the constitution of the Courts are assigned exclusively to the Local Legislature. Before this Act the Courts had no power to make such an order: See *United States* v.

(1) [See *Ex parte Smith* 16 L. C. Jurist 140; *ante* vol. 2, p. 330.]

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Denison (1). If it is now within their power by this Act, it is an enlarging of the power of the Court, which can only be done by the Local Legislature. The whole authorities turn upon the single point that the Dominion Parliament can delegate duties to the Judges of our Courts, or create new subject matter for our Courts to deal with, providing such duties or subject are not assigned [714] exclusively to the Local Legislature. This Act assumes to grant to the Court a right not before existent in it as a Court. It is a dealing with the constitution of the Courts, which is a matter solely for the Local Legislature. Reference was made to Cartwright's Cases under the B. N. A. Act, vol. 1, pp. 171, 191, 193, 197, 203, 207, 209, 212, 213, 218, 230, 257, 510, 515, 519, 520, 542, 686-735; and Taylor on Evidence, 7th ed., p. 1101.

G. H. Watson, contra. The matter is one of international courtesy and comity, and is within the power of the Court. *Valin* v. *Langlois* (2), and *Re Niagara Election Case, Plumb* v. *Hughes* (3) were referred to.

BOYD, C.:—

Section 92, sub-sect. 14, of the B. N. A. Act, relates to "the Administration of Justice in the Province," as to which exclusive jurisdiction is vested in the Provincial Legislature. The controlling words of that sub-section are those I have quoted from the beginning of the clause, *i. e.* "the Administration of Justice in the Province." These are general words which embrace the particulars afterwards specified in the sub-section, which thus proceeds "including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts." Under the general term of Administra-

(1) 2 Ch. Ch. (Ont.) 176. (2) 3 Can. S. C. R. 1; *ante* vol. 1, p. 167.
(3) 29 U. C. C. P. 261.

tion of Justice is embraced the constitution, etc., of Courts, and procedure in the Courts. Thus in the Consolidated Statutes of Upper Canada, under the title "Administration of Justice," we find as sub-division 2 "Courts," and as chapter 22 of that sub-division "Common Law procedure." The scope of sub-section 14 is further manifested by sub-sections 13 and 16, the former relating to property and civil rights in the Province, and the latter to all matters of a merely local or private nature in the Province. This legislation has reference to intra-provincial matters; such, namely, as are therein [715] particularized. But I do not think that the language is intended to include the matters legislated on in 31 Vict. c. 76 (D.) That Statute is to provide, as a matter of international courtesy, for the taking of evidence of persons living within the Province which is needed by foreign tribunals in suits being litigated out of the Province. Such legislation does not pertain to civil rights in the Province, nor to the administration of justice in the Province, nor to the constitution of Provincial Courts for the administration of Justice in the Province. The term "constitution" in this connection was relied on by the appellant. But the primary and proper meaning of the word as here used is, as given in the dictionaries, "the act of constituting; formation." It is, I think, synonymous with the word "establishment," which is used in sect. 101 of the B. N. A. Act.

The taking of evidence in this Province to be used in civil actions pending in foreign tribunals, is not a subject which is assigned to the exclusive legislative authority of the Province by sect. 92, of the B. N. A. Act, because such proceedings are of extra-provincial pertinence and do not relate to civil rights in the Province. The line of reasoning in *The Niagara Election Case* (1), strikes me as

(1) 29 U. C. C. P. 261.

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applicable to the Dominion Act which is now impeached as *ultra vires*. The Dominion Parliament has in effect constituted the Courts of Ontario, and their Judges Dominion Courts for the purpose of taking such evidence in aid of foreign tribunals as a matter of international comity. It is to be noted that Wilson, C. J., who originally dissented from the majority of the Court in the *Niagara Case* (1) retracted that dissent, and expressed his approval of that case: *Regina* v. *O'Rourke* (2). The whole argument for the appellant in this matter is answered by the observation of Lord Selborne in *Valin* v. *Langlois* (3). "There is nothing here (in the Act) to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial [716] Courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

The order appealed from is therefore properly made pursuant to a statute which was within the competence of the Dominion Parliament, and the appeal should be dismissed, with costs.

FERGUSON, J.:—

I am of opinion that quite enough is contained in the judgment in the case of *Valin* v. *Langlois* (4), to indicate what the judgment should be in this case, and I concur in the judgment and conclusion of the Chancellor that the appeal should be dismissed, and the order affirmed. I think there should be costs of the appeal.

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(1) 29 U. C. C. P. 261.
(2) 32 U. C. C. P. p. 402; *ante* vol. 2, p. 660.
(3) 5 App. Cas. p. 120; *ante* vol. 1, p. 164.
(4) 5 App. Cas. 115; *ante* vol. 1, p. 158.

[QUEEN'S BENCH DIVISION.]

GIBSON v. MCDONALD.

1885
Jan. 6.

[*Reported 7 Ontario Reports 401.*]

County Judge's jurisdiction—Grouping Clauses Act—R. S. O. c. 42.

An Act of the Ontario Legislature provided that the County Judge of one County might preside at the Sessions in a County other than that of which he was Judge :

Held, by Armour and O'Connor JJ., (Wilson C.J. doubting), that this enactment was not within the competence of the Legislature.

On the 27th of November, 1884, *Osler*, Q. C., for Gibson, moved, pursuant to notice given in accordance with 46 Vict. c. 6, s. 6, for an order for the issue of a writ of prohibition staying all further proceedings in the matter of an appeal to the General Sessions of the County of Renfrew from the conviction of two magistrates, of and in the Temporary Judicial District of Nipissing, of one George McDonald, for an assault on the said Gibson, on the grounds: 1. That no appeal will lie to the General Sessions of the Peace for the County of Renfrew from a conviction by a magistrate or magistrates in the Temporary Judicial District of Nipissing, the conviction appealed from having been made by magistrates in the said Temporary Judicial District. 2. That the chairman who presided at the said General Sessions of the Peace for the County of Renfrew was not the Judge of the County of Renfrew, but was a Judge of an adjoining County, to wit, the County of Lanark.

Osler, Q. C., in support of the motion. As to one County Court Judge acting in a different County for

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another County Judge, he referred to the B. N. A. Act, sect. 92, sub-sect. 14; R. S. O. c. 42, ss. 22-35, and R. S. O. c. 44, ss. 6, 7, 8. A County Court Judge appointed for a particular County has no criminal jurisdiction outside of his own County: *Wilson* v. *McGuire* (1).

Irving, Q. C., for the Crown. *Regina* v. *Bennett* (2), determined that the Ontario authorities could appoint Justices of the Peace under the Confederation Act, sect. 92, sub-sect. 14, and a magistrate so appointed under the Ontario statutes is a good appointment for the transaction of all magisterial business within such a Judicial District. *The Thrasher Case*, (3) submitted to the Supreme Court by

(1) 2 O. R. 118; *ante* vol. 2, p. 665.

(2) 1 O. R. 445; *ante* vol. 2, p. 634.

(3) [The following case respecting the status of the Supreme Court of British Columbia, and the power of the Legislature of that Province to legislate in respect of proceedings in that Court, and the residences of the Judges thereof, was submitted to the Supreme Court of Canada, in *Sewell* v. *The B. C. Towing and Transportation Company*, commonly called the *Thrasher Case*:—

"Important questions, requiring an early and definite answer, affecting the status of the Supreme Court of British Columbia, and the power of the Legislature of the Province to legislate in regard to procedure in that Court, and the residences of the Judges thereof, having been raised on the hearing of what is commonly known as the *Thrasher Case*, had before Sir M. B. Begbie, Chief Justice, Mr. Justice Crease and Mr. Justice Gray of that Court, under circumstances not, it is thought, admitting of an appeal to the Supreme Court of Canada, the opinion of the Supreme Court of Canada is desired by His Excellency the Governor-General in Council upon the following questions referred under the provisions of sect. 52 of 'The Supreme and Exchequer Court Act:'

"1. Is the Supreme Court of British Columbia a Provincial Court within the meaning of the 14th sub-sect. of sect. 92 of the B. N. A. Act?

"2. Has the Legislature of the Province exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province? If not, to what extent has it such authority?

"3. If that Legislature can make rules to govern the procedure of that Court, can it delegate this power to the Lieutenant-Governor in Council?

"4. Is the 'Judicial District Act, 1879,' British Columbia, within the powers of the Legislature of that Province? If so, does it apply to Judges appointed before that Act came into force?

"5. Are the following Acts passed by the Legislature of British Columbia, namely:

"The 'Better Administration of Justice Act, 1878' (42 Vict. c. 20, 1878);

"42 Vict. c. 12 (1879), An Act to amend the practice and procedure of the Supreme Court of British Colum-

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the Governor-General, shews the powers of Provincial Legislatures to legislate in cases providing for the judicial services of Judges. The R. S. O. c. 42, s. 13, is the one under which County Court Judges have been authorized to act in certain cases beyond the limits of their own Counties, and *Wilson* v. *McGuire* (1), maintained the legislation which was moved against.

Lash, Q. C., for the original defendant. As to the question relating to the County Court Judge, *Valin* v. *Langlois* (2), was a decision in favour of what has been done by the Ontario Legislature in passing the Act in question. The Judicature Act enables the Judges of one of the Superior Courts to sit in any of the other Divisions of the High Court.

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bia, and for other purposes relating to the Administration of Justice;

"44 Vict. c. 1, An Act to carry out the objects of the 'Better Administration of Justice Act, 1878,' and the 'Judicial District Act, 1879;'

"So far as they relate to procedure in the Supreme Court of British Columbia, within the legislative authority of the Legislature of the Province?"

The following is the opinion of the Supreme Court on the above case, reported 4 Canada Law Times, p. 53:

1. The Court is of opinion that the Supreme Court of British Columbia is a Provincial Court, within the meaning of sect. 92, sub-sect. 14, of the B. N. A. Act, 1867.

2. The Court is of opinion that the Legislature of the Province has exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province which come within the jurisdiction of the Provincial Legislature.

3. The Court is of opinion that the Legislature can make rules to govern the procedure of that Court in all such matters as are limited by the preceding answer, and can delegate their power to the Lieutenant-Governor in Council.

4. The Court is of opinion that the "Judicial District Act, 1879" (B.C.), is within the powers of the Legislature of the Province, and that it does apply to the Judges appointed before that Act came in force.

5. The Court further held that, so far as they relate to procedure in the Supreme Court of British Columbia, the following Acts were constitutional:—The Better Administration of Justice Act, 1878 (42 Vict. c. 20); 42 Vict. c. 12 (1879), An Act to amend the practice and procedure of the Supreme Court of British Columbia, and for other purposes relating to the Administration of Justice; 44 Vict. c. 1, An Act to carry out the objects of the Better Administration of Justice Act, and the Judicial District Act, 1879.]

(1) 2 O. R. 118; *ante* vol. 2, p. 665.

(2) 5 App. Cas. 115; *ante* vol. 1, p. 158.

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Osler, Q.C., in reply, referred on the general constitutional question to *Re Squier* (1); *Lenoir* v. *Ritchie* (2).

WILSON, C.J.:—

[After discussing whether an appeal would lie from the convicting Justices and concluding that it would not, the learned Judge said, p. 408]:

Upon the point of the County Court Judge of Lanark presiding on the hearing of the appeal in the County of Renfrew I give no positive opinion, as it is not necessary to do so; but I am more in favour of holding that the County Court Judge of Lanark had the power to preside, than to hold he had not.

ARMOUR, J.:—

[After discussing whether an appeal would lie and concluding that it would not, the learned Judge continued, p. 411]:

As to the second contention, that the person who presided at the Court of General Sessions of the Peace for the County of Renfrew, at which this appeal was heard, had no authority so to preside, I have but little to add to what I said in *Wilson* v. *McGuire* (3), for this is only another phase of the same usurpation.

I do not decide or discuss, but expressly reserve the question as to the power of this Province to appoint Justices of the Peace, and to appoint County Court Judges to be Justices of the Peace for every County and part of Ontario; nor do I discuss the power of this Province to provide that the Judge of the County Court of the County of Lanark shall be chairman at the General Sessions of the Peace for the County of Renfrew, for this has not been

(1) 46 U.C.Q.B. 474; *ante* vol. 1, p. 789.
(2) 3 Can. S.C.R. 575; *ante* vol. 1, p. 488.
(3) 2 O. R. 118; *ante* vol. 2, p. 665.

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so provided; but it is provided that the Judge of the County Court of the County of Renfrew shall be chairman of the General Sessions of the Peace for the County of Renfrew, and when this appeal was tried the Judge of the County Court of the County of Lanark was presiding [412] as chairman of the General Sessions of the Peace for the County of Renfrew only and not otherwise than by virtue of his office of Judge of the County Court of the County of Lanark, which, in the view I take, he had no right to do.

In my opinion, therefore, both contentions must prevail, and the order must be absolute for a prohibition.

O'CONNOR, J.:—

Two questions were presented for the consideration of the Court: (1) Whether an appeal lay from a conviction of Justices of the Peace in the Temporary Judicial District of Nipissing, to the General Quarter Sessions of the Peace for the County of Renfrew, the County nearest to Nipissing, or not. (2) Whether, if the appeal lay, the Judge of the County Court of the County of Lanark had authority to preside at the said Sessions and try the appeal, or not; the Counties of Renfrew and Lanark being grouped together and forming a District for judicial purposes, under cap. 42, Revised Statutes of Ontario.

[After discussing the first question and concluding that there was no appeal, the learned Judge continued, p. 415]:

The second question, propounded and argued with much skill and ability on both sides, involves the "constitutionality" of a statute of the Legislature of the Province of Ontario (1). This question presents an inquiry which is pregnant with grave considerations arising from a due appreciation of the serious consequences which may result from an erroneous decision either way. Declaring a

(1) 39 Vict. c. 14 (R. S. O. c. 42, s. 16, *et seq.*)

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statute affecting general and important matters void must involve great responsibility, because interests of greater or less, and probably of very great general importance, are almost sure to be injured. Hence Mr. Justice Cooley, in his able and well considered Treatise on Constitutional Limitations, aptly observes:

"It must be evident to any one that the power to declare a legislative enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can consistently, with a due regard to duty and official oath, decline the responsibility." And he adds:

"In declaring a law unconstitutional, a Court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation."

But how much more forcibly do such remarks apply to a like proceeding in this country, where the expression "constitutionality of a statute" is the result of a new departure and the creation of a new practice previously unknown to Canadian and British affairs, and to parliamentary and judicial practice, than to the legislative and [416] judicial system of the United States, where that institution was made a fundamental principle of their constitution, as a result of popular volition.

There, it is a fundamental principle of a new constitution, resulting immediately from the will of the people in a state of revolution. Here, it is merely a new thing engrafted on an old constitution, as a mere outgrowth of circumstances resulting from the necessities of local position in this new world, and of colonial dependence. And for the same reasons the application of the institution is

also more difficult and irksome here than it is in the United States.

In the present case the duty cast on the Court is peculiarly onerous and delicate. The Act in question purports to effect peculiar changes and new and essential arrangements in an important, though inferior, branch of the judicial system of the Province.

It was passed, acted upon and put into operation several years ago, and it has continued in operation since, notwithstanding that doubts concerning its validity have always existed and been frequently expressed.

It may easily be imagined, therefore, that important interests of both a public and private nature must be disturbed and affected, in most cases injuriously, if the statute be found destitute of authority and consequently void. It is impossible to calculate the evil results which may be expected to result from the confusion created by so disturbing a cause.

But, on the other hand, allowing matters to continue and proceed under such a statute can lead only to a greater accumulation of evil results and more disastrous consequences; for sooner or later the statute is sure to be brought to the crucial test, be the consequences what they may.

It is the privilege of every man to insist that his rights and interests shall be regulated by laws of undoubted validity. The sooner then a statute, which is seriously believed by many, and especially by a considerable portion of the legal profession, to be unconstitutional, is authorita- [417] tively pronounced upon the better. The public interest requires that proceedings under such a statute should be stayed, if it be void; or, if possessed of the authority it purports to have, it is necessary, or at least advisable, that doubts respecting it should be set at rest by a declaration of the proper tribunal, clothed with the necessary authority.

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Impressed with this view of the subject, I proceed to the consideration of the second question raised and awaiting decision.

The Judge of the County Court is, by an old statute, which does not appear to have been repealed, Chairman of the Court of General Quarter Sessions of the Peace in the county for which he is commissioned; and this is imperative: Con. Stat. U. C. c. 17, s. 5, and the original statute there referred to; and see also R. S. O. c. 44, s. 6, which is precisely the same. The Judges were appointed by the Governor-in-Council.

Section 96 of the B. N. A. Act provides that "The Governor-General shall appoint the Judges of the Superior, District, and County Courts."

Section 1, c. 15, Con. Stat. U. C. provides: "There shall be in every county, or union of counties, in Upper Canada, a Court of law and record to be styled the County Court of the county of , or united counties of , (as the case may be);"

Section 2 of the same Act provides: "The Governor shall, from time to time, appoint under the great seal, one person or two persons, being a barrister or barristers, of at least five years' standing at the bar of Upper Canada, to be the Judge or Junior Judge in each of the said Courts."

The Judge is therefore appointed under the great seal to be and he is the Judge in the County Court of the particular county; and by section 5, he "shall reside within the county for which he is appointed." Section 7, referring to the Judge, Junior Judge, etc., of the County Court, uses the expression, "within his county." Section 8 gives the form of oath the Judge is to take, wherein he swears [418] that he will truly and faithfully, etc., "execute the several duties, powers and trusts of Judge of the County Court of the county of ."

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It is, then, abundantly evident that the Judge, Junior Judge, etc., is appointed for a particular county, and for one county only; he must reside therein, and his oath of office applies to that and no other county. But, as already stated, the Judge of the County Court of the county "shall preside as Chairman at the General Quarter Sessions of the Peace for the county; but in case of the absence from sickness, or other unavoidable cause, of the Judge of the County Court, and of the Junior and Deputy Judge thereof, *the justices present shall elect another Chairman pro tempore.*"

Section 8 of c. 44, R. S. O., omits the latter part of the foregoing clause of the consolidated statutes, which provides for the election of a chairman *pro tem.*, and provides that: "Wherever, from illness or from other casualty, the Judge who is to hold the sittings of the General Sessions of the Peace, is unable to hold the same at the time appointed therefor, the sheriff of the county . . may adjourn, by his proclamation, the said Court . . from day to day, until the Judge is able to hold such Court, or until he (the sheriff) receives other directions from the Judge or Provincial Secretary."

The consolidated statute uses the expression, "General Quarter Sessions of the Peace," and in the Ontario Act it is the "General Sessions of the Peace;" but I presume both expressions refer to, and mean the same thing. Both statutes seem clearly to enact that the Judge, or Junior Judge, etc., shall preside as chairman of the Quarter Sessions; in fact, the duty of so presiding is attached to the office, and to the individual only as the incumbent of the office. Then, if the Provincial Legislature has no power, as I hold it has not, to appoint a County Court Judge, or to give him power or authority as such, neither has it, in my opinion, power to authorize a County Judge to preside at the Quarter Sessions of a county other than that for

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[419] which he is appointed by the Governor-General; for that authority is inherent in and a function of the office of the Judge of that other County, which that Judge is sworn to perform. In fact, to hold otherwise would be to hold that a Provincial statute may authorize a class of persons to act as County Court Judges in Counties for which they have never been appointed as such by the Governor-General, and therefore to act as County Court Judges without having been appointed as such. But the exclusive right to appoint the Judges is reserved to and vested in the Government of the Dominion, and even the Parliament of the Dominion cannot divest the Government of that power, for it cannot so change the B. N. A. Act.

The Provincial Legislature has, then, no power or authority to authorize or make such appointments. It is true that the Ontario Act does not purport directly to make or authorize such appointments, but it attempts to do so indirectly, by assuming to clothe the Judge of a County Court, who has been duly appointed for that County, with the powers and authority of a Judge of the County Court in other Counties, which are not included in his commission as united Counties. But the Legislature cannot do indirectly that which it is precluded from and has no power to do directly.

It was suggested on the argument by counsel for the Province, that the effect of the Act in question was merely that it appointed a certain person designated by the name of his office who was to preside at the Quarter Sessions, and that the Legislature had power to do this. I cannot accept this suggestion as a valid argument; it begs the question rather than establishes the proposition. The Provincial Legislature may, I presume, alter and change the constitution of the County Court and of the Quarter Sessions, as it has altered the constitution of the Superior

Courts, but it cannot appoint or authorize the appointment of the Judges of those Courts. By the clause of the B. N. A. Act, already cited, the appointment of the Judges is vested in the Dominion Government.

[420] But besides this it must be observed that by the 9th section the Executive Government of and over Canada is continued and vested in the Queen.

The Queen is neither part nor branch of the Provincial Legislature, but she is of the Dominion Parliament.

The Dominion of Canada is the larger and more general organization, and its executive has by sect. 12 of the B. N. A., or Constitutional Act, all the powers which the Province had at the time of the Union, "as far as the same continue in existence and capable of being exercised after the Union;" that is to say, its powers are as nearly like and as extensive as are those of the executive of the United Kingdom, as the powers of a colony may be in its relations to the parent state.

The Province is within the Dominion, is part thereof, and therefore narrower and necessarily subordinate in position and extent of authority; and accordingly, after providing and constituting the Provincial Executive Government, the Act, by its 65th section, provides that the powers of its executive are those of the late Province, "as far as the same are capable of being exercised after the Union in relation to the Government" of the Province.

It is remarkable that the words, "as far as the same continue in existence," which are in the 12th section, are omitted from the 65th section. Of the precise effect of this omission I am not prepared to speak with confidence; but I think it indicates that some powers continued to exist in relation to the Dominion and were vested therein, but which did not continue to exist in relation to the Province—that, in short, all the former powers continued to and were vested in the Dominion, as far as they could

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be exercised, but that the Province took only such powers, being part of those continuing to exist, as were suitable to its position, legislative powers and needs required in relation to the Dominion and its Government.

The Governor-General is the direct representative of the Queen, her only representative in Canada, holds his [421] commission immediately from her Majesty, and exercises the larger powers of the Executive of the Dominion, inferior only to the powers of the Imperial Government, but superior to those of the Provincial Government.

He, therefore, exercises all the executive power which is vested in Her Majesty by the Act, and the prerogative powers of the Crown to the fullest extent that they are capable of being exercised in relation to the Dominion; that is, to the fullest that is consistent with colonial dependence, for that is the effect of his commission and instructions. The Queen is the foundation of justice. Justice is, in the theory of the constitution, as it was originally in fact, administered by the Crown; that is, by the king in person, in his *Aula Regia*.

No person can administer justice but by the authority and in the name of the Queen.

She, therefore, appoints the Judges or Justices, who administer justice in her Courts.

In Canada the Governor, who alone represents her there, appoints the Judges in her name, under the advice of his council.

The criminal law is a branch of that justice which can be administered in Her Majesty's name only, by Justices appointed by her for that purpose.

A limited portion of the criminal law is administered in the Court of General Quarter Sessions, and it seems impossible to escape the conclusion that the persons who administered it there must be commissioned thereto by Her Majesty. This position is strongly fortified by the fact

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that legislative power over the criminal law, and of criminal procedure in the Courts, is vested exclusively in the Parliament of the Dominion. A full consideration of the whole subject properly regarded in the light of the Constitutional Act leads inevitably to the conclusion that all persons who administer the criminal laws, which is the branch in question in the present case, by whatever name they may be designated, must be commissioned by the Crown for that purpose; and in Canada that means by the Government of the Dominion.

[422] To make the matter clearer, it may be as well to examine somewhat more in detail the composition of the Executive of the Province. Section 58 of the Act provides that an officer, to be styled the Lieutenant-Governor, shall be appointed by the Governor General in Council, by instrument under the Great Seal of Canada.

Section 63 provides that: "The Executive Council of Ontario . . . shall be composed of such persons as the Lieutenant-Governor, from time to time, thinks fit; and in the first instance of the following officers, namely:— the Attorney-General, the Secretary and Registrar of the Province." etc.

These form the Government of the Province with the powers mentioned in section 65, already referred to.

Of this Government neither the Queen nor her representative is a part. It is composed merely of "officers," of whom the Lieutenant-Governor is an officer of the Dominion, appointed by the Governor General. This distinction is a marked one, which seems in itself clearly to exclude from the Provincial Government the exercise of the Crown's prerogative, and the statutory powers reserved to the Crown in relation to the administration of justice in Canada. This seems to have been the opinion of the late Chief Justice Harrison, as cautiously indicated

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in *Regina* v. *Amer* (1), and I am aware that it in a measure conflicts with an *obiter dictum* expressed in the same case by the present Chief Justice of this Court; but the question has undergone much discussion and consideration whereby additional and clearer light has been cast on the subject since then.

It only remains now to examine, more fully than I have already done, and compare the legislative powers of the Parliament of the Dominion and of the Legislature of the Province in relation to the administration of justice.

Section 91 of the Constitutional Act provides that "it shall be lawful for the Queen, by and with the advice and consent, &c., to make laws for the peace, order, and good government of Canada, in relation to all matters not [423] coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

"27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

The Parliament of Canada, then, has power "to make laws for the peace, order, and good government of Canada in relation to all matters," &c. Then observe the force of the words, "and for greater certainty, but not so as to restrict the generality of the foregoing terms," &c.

The expression, "The Criminal Law," in sub-sect. 27, must be read with reference to the expression "for the peace, order, and good government of Canada," in the principal clause.

(1) 42 U. C. Q. B. 391; *ante* vol. 1, p. 722.

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Then it is necessary to observe the force of the concluding paragraph of the same clause: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of *a local or private nature* comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Section 92 provides:

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

[424] "16. Generally all matters of a merely local or private nature in the Province." These words of a "local or private nature," repeated here and emphasized by the adverb "merely," make the limitation of the power of the Provincial Legislature to such matters clear and precise. Its power is undoubtedly, then, subordinate to that of the Parliament of Canada, and in no respect are their powers co-ordinate.

Then, as regards the criminal law, it stands thus between the Parliament of Canada and the Legislature of the Province. The Provincial Legislature has the exclusive right to make laws for the constitution, maintenance, and organization of the Courts; the Parliament of Canada has the exclusive control of the criminal law, and of the procedure in criminal matters.

Then, besides the constitution of the Courts, the appointment of the Judges and the procedure in criminal matters, there is a residue, called the administration of

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justice, which is assigned exclusively to the Legislature of the Province.

It does not include, but excludes the appointment of Judges and the criminal law and procedure, but it includes the administration of justice in other respects, and the constitution of the Courts in all respects, except as to the person who administers justice therein. The criminal law and procedure, and the appointment of the Judges, are carefully excluded from the legislative control of the Province. In short, the Legislature of the Province possesses only *enumerated* powers of a local and a private nature conferred on it; but the Parliament of Canada possesses the general powers of legislation necessary for the peace, order, and good government of Canada, only part of which is *enumerated*.

I therefore conclude that the Legislature of the Province has no power, by Act or otherwise, to confer on any person authority to preside at the Quarter Sessions in any County to administer the criminal law therein, instead of the Judge or Junior Judge, &c., of the County Court of [425] that County; and it makes no difference, I think, that such person is the County Judge of another County. The Act in question is therefore not within the competency of the Provincial Legislature, and is void. (1)

(1) [An unsuccessful attempt has since been made, in *McKenzie* v. *Dancey* (May 26, 1885), to bring this point before the Court of Appeal, but the case was disposed of on other grounds. It is understood that the Government of Ontario purpose bringing the matter before the higher Courts at the first opportunity.]

[MASTER'S OFFICE.]

CLARKE v. UNION FIRE INSURANCE COMPANY.

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Oct. 30.

[*Reported 10 Ontario Practice Reports 313.*]

Provincial incorporation—B. N. A. Act, s. 92, sub-s. 11.

A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments ; and may enter into contracts outside the Province wherever such contracts are recognised by comity or otherwise.

The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.

In this case a decree was made at the suit of a creditor, referring it to the Master in Ordinary to wind up the company, and to adjudicate upon the claims of creditors holding policies of the defendant company. Prior to the decree a common law action had been commenced by the claimants, the Export Lumber Company of New York, against the defendants, on their policy, which was referred to the Master pursuant to the decree. The other facts of the case appear in the Master's judgment.

Falconbridge, for the Export Lumber Company.

W. A. Foster, for the plaintiff.

A. C. Galt, for the defendants.

[314] MR. HODGINS, Q. C. :—

This is a claim brought in by the Export Lumber Company of New York, against the defendants, a fire

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insurance company incorporated by the Legislature of Ontario, 39 Vict. c. 93. The policy, dated 5th August, 1880, was delivered to the claimants on the 7th or 8th, and the fire occurred on the 10th of the same month. On the 11th the claimants tendered a cheque for the premium, which was immediately returned by the defendants.

The principal defences are that the defendants being a provincial company had only limited powers, and could not contract out of this Province; and that, the premium not having been paid or tendered until after the loss occurred, the policy is void.

In arguing that the contract was *ultra vires*, it was contended that as the B. N. A. Act (sect. 92 sub-sect. 11) empowered the Provincial Legislatures to incorporate companies with "Provincial objects," this corporation could have no existence, and therefore no power to contract, outside the Province; and in any event that not having obtained legislative sanction authorizing it to make contracts of insurance outside the Province, this contract was void.

The substantial objection is against the legislative powers of the Provincial Legislatures; for it was contended that a corporation created by them has not the status nor capacity to contract outside of provincial jurisdiction which a Dominion corporation possesses. There is no warrant for this contention. There is nothing in the B. N. A. Act, nor in the classes of subjects within their legislative authority, which would place these Legislatures outside the definitions given by writers on this subject: "The colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories:" 1 Story's Const., 4th ed., sect. 171. "The legislative bodies in the dependencies of the Crown, have *sub modo* the same powers of legislation as their prototype

in England, subject, however, to the final negative of the Sovereign:" 1 Broom's Com. 123.

[315] The term "incorporation of companies with Provincial objects" in the B. N. A. Act (sect. 92 sub-sect. 11) defines the classes of corporations within the legislative authority of the Provinces; and its meaning must be gathered from analogous clauses empowering them to make laws in relation to "local works and undertakings" (sub sect. 10) and "matters of a merely local or private nature in the Province" (sub-sect. 16) and under which it is obvious the legislature may incorporate companies for like purposes. These references shew that the terms "provincial" and "local" are interchangeable, and must be construed to mean "local objects" within a Province, in contradistinction to objects common to the several Provinces in their collective or Dominion quality, and which are within Dominion legislative jurisdiction.

This power to incorporate companies is incidental to a sovereignty, though such power may be delegated. "The Sovereign, it is said, may grant to a subject the power of erecting corporations, . . but it is really the crown that erects, and the subject is but the instrument:" 1 Bl. Com. p. 452. Corporations may be erected by charter or by Act of Parliament "of which the Royal assent is a necessary ingredient." *Ibid* p. 451.

This assent of the Crown, as essential to the validity of the Acts of the Provincial Legislatures, has been questioned by the *obiter dicta* of some learned Judges, who say that Her Majesty forms no constituent part of the Provincial Legislatures as she does of the Dominion Parliament. This denial of the legislative authority of the Crown in Provincial legislation touches the validity of all Provincial Acts since confederation, as the usual form of the Provincial statutes is "Her Majesty, by and with the advice, etc., enacts." "The legislative power

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(says Lord Hale) is lodged in the King, with the assent of the two Houses of Parliament:" 1 Hale's Juris. Ho. Lds. 4: "The making of statutes is by the king with the assent of Parliament:" 1 Whitelock King's Writ, 406: "The king has the prerogative of giving his assent to such [316] bills as his subjects, legally convened, present to him, that is of giving them the force and sanction of a law:" Bacon's Abr. tit. Prerog. 489. See also 4 Co. Ins. 24.

This is but the common law on the legislative prerogative of the Crown. A reference to the Imperial Acts which gave legislative institutions to this Province prior to the B. N. A. Act, will shew that the Provincial laws of Upper Canada were to be made by "His Majesty, his heirs and successors," (31 Geo. 3 c. 31), and of Canada by "Her Majesty her heirs or successors," (3 & 4 Vict. c. 35) by and with the advice and consent of the other legislative bodies; and these Imperial Acts in so far as they recognise the legislative prerogative of the Crown in this Province have not been repealed, but are substantially continued by sect. 129 of the B. N. A. Act.

The question, however, appears to have been determined in 1876 by the Judicial Committee of the Privy Council in *Théberge* v. *Landry* (1)—which is binding on all our Courts—where Lord Cairns, L. C., referring to an Act of one of the Provincial Legislatures then under review, held that it was an Act which had been assented to by the Crown, and to which the Crown therefore was a party.

The B. N. A. Act created two separate and independent governments with enumerated and therefore limited parliamentary powers. These dual governments within their defined limits of jurisdiction now exercise the legislative and executive powers previously vested in one

(1) 2 App. Cas. 102, 108; *ante* vol. 2, p. 1.

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government; and although both exist within the same territorial limits, their powers are separate and distinct, and they act separately and independently of each other within their respective spheres. The powers of the legislative department of the Provincial Governments have been defined by our Provincial Courts. The case of *Re Goodhue* (1), decides that there is no limitation imposed on the Provincial Legislatures as regards the extent to which they may affect private rights and matters of a merely local and private nature in the Province; and that [317] as to such objects they can pass laws to the same unlimited extent that the Imperial Parliament may in the United Kingdom. In *Regina* v. *Hodge* (2), it is stated that the Dominion and Provincial Legislatures derive their powers from the same source; and that "the power to make laws in relation to the several classes of subjects, legislation upon which is, by the Imperial Act, committed exclusively to the Provincial Legislatures is as large and complete as it is in the classes of subjects committed by enumeration of subjects to the Dominion Parliament. The limits of the *subjects* of jurisdiction are prescribed; but within those limits the authority to legislate is not limited." See also *Hodge* v. *The Queen* (3).

These cases shew that both the Dominion and the Provincial Legislatures have plenary powers of legislation to the extent necessary for the efficient exercise of the exclusive legislative authority of each; and that they therefore are sovereignties within the definitions given in 1 Story's Const. sect. 171; *Phillips* v. *Eyre* (4); and *The Queen* v. *Burah* (5). Each has authority to create corporations; and therefore a company incorporated by a Provincial Legislature has, for the purposes of its business,

(1) 19 Grant 366; *ante* vol. 1, p. 560. (4) L. R. 6 Q. B. 20.
(2) 7 App. Rep. 246, 251; *ante* p. 166. (5) 3 App. Cas. 889; *post* Appendix I.
(3) 9 App. Cas. 117; *ante* p. 144.

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the same corporate franchises and powers within the jurisdiction creating it, as a company incorporated by the Imperial or the Dominion Parliament, and may transact its business outside the Province wherever by comity or otherwise its contracts are recognised.

This power to transact insurance business outside the provincial jurisdiction creating such corporations is regulated within Canada by the Act 40 Vict. c. 42 sect. 28, which provides that companies incorporated by a Provincial Legislature for carrying on the business of insurance within a Province, may, under certain conditions transact such business throughout the Dominion. And the case of *Citizens Insurance Co.* v. *Parsons* (1), illustrates to some extent the jurisdiction of the Provincial Legislatures over companies incorporated by the Imperial or Dominion Parliaments.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

(1) 7 App. Cas. 96; *ante* vol. 1, p. 265.

COURT OF REVIEW.

THE HON. J. A. MOUSSEAU, ATTORNEY-GENERAL *v.* BATE. 1883*

Jan. 23.

[*Reported 27 L. C. Jurist 153.*]

Letters Patent, proceedings to set aside—35 Vict. c. 26, D.

Proceedings in the nature of a *scire facias*, to set aside Letters Patent of invention issued under the Dominion Statute, 35 Vict. c. 26, cannot be instituted in the name of a Provincial Attorney-General, and can only be legally brought by the Attorney-General of Canada.

This was a review of a judgment rendered by the Superior Court at Montreal (Taschereau, J.) on the 1st of December, 1882 (1).

The counsel for the plaintiff submitted the following argument in review on the question as to the right of the Provincial Attorney-General to sue :

In Con. Stat. Can. c. 34, s. 30, is found practically the same provision as is contained in sect. 29 of the present Act, except that under that Act only Upper and Lower Canada were included, and there being no provision requiring the patentee to elect domicile, the action might be brought in either Province, whereas under the Act of 1872, the information must be laid before the Court of the place where the patentee elected domicile.

The next Act to be referred to is also a Statute of United Canada, commonly called the Code of Civil Procedure of Lower Canada, Art. 1035. The Attorney-General referred to in said article was necessarily the Attorney-General of United Canada.

* Present :—SICOTTE, TORRANCE and RAINVILLE, JJ.

(1) *Post*, p. 345.

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ARGUMENT.

By sect. 135 of the B. N. A. Act it is provided as follows:—"Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities at the passing of this Act, vested in or imposed on the Attorney-General, Solicitor-General, etc., by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them."

We may look in vain through the B. N. A. Act to discover anything repugnant to the position occupied by the Attorney-General in this case; indeed sect. 92, subsect. 14, is in direct confirmation of the right of the local Attorney-General. If the taking of the present action is not an act performed in the administration of justice, it is difficult to see what it is. If the local Attorney-General does not represent the Crown in matters relating to the administration of justice under the patent law, what reason can be given for his doing so under the criminal law? The fact is that before the Courts of the Province the Crown is represented and acts through the Attorney-General of the Province: *Attorney-General of Ontario* v. *Niagara Bridge Company* (1).

Does the Dominion Statute of 1868, c. 39, sect. 3, interfere with the doctrine above laid down? That Act does not say that the Minister of Justice is to represent the Crown in relation to all laws passed by the Dominion Parliament, but only in relation to laws administered under the authority of that Parliament, such, for example, as require to be put in execution by Dominion Courts. But the Patent Act is not such a law. It is administered like the criminal law by the Provincial Courts. See, also, the subsequent clause of the same section, where it

(1) 20 Grant, 34; *ante*, vol. 1, p. 813.

is provided that the Minister of Justice shall have the regulation and conduct of all litigation for or against the Crown, or any public department, in respect of any subjects within the authority or jurisdiction of the Dominion. It is evident that the words litigation for or against the Crown mean nothing more than those cases where the Crown appears as an ordinary litigant with rights to enforce in its own behalf and for its own benefit, or where damages or remedies have accrued to the Crown in consequence of the infraction of some law of the Dominion. If this section means more than this, it is contrary to sect. 135 of the B. N. A. Act and unconstitutional.

The counsel of the defendant, with a view to obtain a confirmation of the judgment appealed from on its merits, acquiesced in the argument of the plaintiff's counsel as to the mere right of the plaintiff to institute such a proceeding as the present one.

The following was the judgment in Review :—[156]

[*Translated.*]

Considering that by the Statute of Canada of 1868, 31 Vict. c. 39, it is enacted that the Minister of Justice shall be *ex officio* Attorney-General of Her Majesty in Canada, having the superintendence of all matters connected with the administration of justice in Canada not being within the jurisdiction of the Governments which compose it ;

Considering that it is, moreover, enacted by the same statute that the Attorney-General of Canada shall discharge the duties which belong to the Attorney-General of England, and also the duties which, by the laws of the different Provinces, belong to the Attorney-General of each Province up to the period when the B. N. A. Act,

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1867, came into effect, which laws ought to be administered and enforced by the Government of the Dominion, that he shall regulate and conduct all litigation between the Government or any public department concerning subjects which are within the authority or jurisdiction of the Dominion;

Considering that in the present case the litigation is respecting a patent for an invention granted to the said Bate by the Minister of Agriculture, one of the public departments of Canada, and to which the said Holman objects in conformity with the provisions of the Statute of Canada, c. 35 (1) of 1872, and as is allowed by sect. 29;

Considering that by the Statute of 1872, sect. 52, of c. 34, of the Consolidated Statutes of the former Province of Canada concerning patents of invention, and all laws and other Acts relating to patents of invention have been and are repealed;

Considering that legislative authority over patents of invention is exclusively within the jurisdiction and powers of the Federal Parliament and Government, and that by the Act of 1868, already cited, all that can relate to the interpretation of a Federal Statute and of the Statute relating to patents of invention is within the province and jurisdiction of the department of justice of the Federal Government, it follows that the writ of *scire facias* of which sect. 29 of the Statute of 1872 speaks, should issue under the fiat of the Attorney-General of Canada, and not of the Attorney-General of the Province of Quebec;

Considering, also, that by the Act of 1868 the Parliament of Canada has modified and changed in conformity with the B. N. A. Act, 1867, the provisions of sects. 129, 130, 134 and 135 of that Act concerning certain powers to be exercised by the law officers of the Provinces so far

(1) The Act referred to is 35 Vict. c. 26.

as the Parliament of Canada should not have otherwise provided, and that by reason of this legislation these powers and functions cannot be exercised except in terms of the laws promulgated by the Parliament of Canada;

The Court adjudges and declares that the writ of *scire facias* issued in this case under the fiat of the Attorney-General of the Province of Quebec has been wrongly issued and contrary to the provisions of law in that behalf; confirms on this ground, the judgment of the Superior Court of the 1st of December, 1882, without adjudging and deciding on the matters pleaded by the contestant and the other grounds set forth in the judgment in question;

Reserves to the said plaintiff his right to proceed [157] as he may be advised in order to obtain the fiat of the officer appointed by the statute for issuing a writ of *scire facias;*

Orders the plaintiff to pay the costs incurred in the Court of Review.

Archibald & McCormick, for plaintiff.

Church & Co., for defendant.

JUDGMENT IN THE SUPERIOR COURT, (*before which the suit came originally, so far as the same relates to the Constitutional question*).

[*Translated*].

(Reported 27 L. C. Jurist, 153.)

TASCHEREAU, J. :—

Considering that the patent of invention which it is sought to set aside in this case was granted by the said Commissioner of Patents, acting for the Government of Canada, under the provisions of the Patent Act of 1872, and its amendments; that the said Act (sects. 29, 30 and 31) provides for the proceedings to be taken, for the purpose of setting aside patents of invention granted under the

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Taschereau, J.

authority of its provisions, and gives jurisdiction in such matter to the Superior Court of the Province of Quebec, when the patentee has his domicile in the said Province, which Court is then called on to enforce a law exclusively federal; that by the B. N. A. Act, [154] 1867, patents of invention and all legislation connected therewith, are under the exclusive control and jurisdiction of the Parliament of Canada; that by the Act 31 Vict. c. 39, the Attorney-General of Canada is alone competent to regulate and conduct all litigation for or against the Crown, concerning the subjects which come under the authority or jurisdiction of the Dominion, and consequently was alone competent to take action for the purpose of causing the setting aside of a patent of invention granted by the Government of the Dominion in virtue of a federal law;

Considering that the Attorney-General of the Province of Quebec, by means of a writ of *scire facias*, can only demand the setting aside of letters patent issued by the Government of the said Province and under the authority of Provincial laws;

Considering that a patent of invention can only be set aside by *scire facias* absolutely and throughout the whole Dominion, and not as to one Province alone, and that so (in addition to the above reasons) the Attorney-General of a Province would be altogether unable to apply to the tribunals of this Province for the purpose of demanding such a setting aside of a patent which would take effect throughout all Canada;

The Court sustains the defence, annuls and sets aside the writ of *scire facias* issued in this case and non-suits the plaintiff; and as to the costs of defence incurred by the said defendant, the Court recommends that they be paid to him by the proper person. (1)

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(1) [In *R.* v. *Pattee*, 5 P. R. (Ont.) (Jan. 5, 1871), on an application to set aside a writ of *sci. fa.*, issued to rescind a patent, it was held by the present Master in Chambers for Ontario (Mr. Dalton, Q. C.), then Clerk of the Crown and Pleas of the Court of Queen's Bench, sitting as a Judge in Chambers, that the Attorney-General of Ontario was the proper authority to grant the *fiat* in such a case. The following is the judgment, so far as relates to the constitutional question:—

After deciding that a *fiat* for the issue of the writ was necessary, the judgment continues, p. 296:

It may provoke a smile that an officer of the Court, in deciding a matter of practice, should incidentally consider a question under our constitution, which is of some importance in itself, and is a part of larger questions. It is of little matter, however, where it may begin; it must come to the decision of the Court. I was told, when I suggested the question on the argument, that it was very doubtful whether the Minister of Justice or the Attorney-

General for Ontario be the proper authority to grant a *fiat* in such a case. I must, therefore, suppose it is doubtful, though I myself cannot see the grounds for doubt. I cannot think that *two* authorities exist, *either* of whom may grant it. Some one authority, and one *only*, must answer here the position of the Attorney-General in England in respect of this matter.

The B. N. A. Act, sect. 92, enacts that, "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say (after twelve other heads)—13. Property and civil rights in the Province; 14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

These sections express the powers of the Legislature of Ontario.

[297] Then, as to the Executive, sect. 135 enacts that, "Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities, at the passing of this Act, vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same, or any of them." So that, as is consistent and natural, the executive and legislative functions of the Government of Ontario seem to be co-extensive.

The words of this statute have been well weighed. But what definition of "property and civil rights" can exclude the right of enforcing a civil remedy in the Courts? To lawyers, that seems the practical proof and test of all right; without it, at any rate, no other right is of any real value. And, further, there is attributed to the local jurisdiction "the administration of justice in the Province, . . . including procedure in civil matters." Then if the legislative and executive powers, as to "property and civil rights in the Province," and "the administration of justice," and as to civil proceedings in the Courts, are in the Government of Ontario, can it be thought that any other authority is for the present purpose indicated than that of an officer of Ontario responsible to its Legislature. For, let it be borne in mind, that he who has the discretion to grant, has also the discretion to withhold, and that it is only by *scire facias* that a subject in Ontario, aggrieved by a patent wrongly issued, can seek the remedy of its avoidance.

I desire not to amplify; but other reasons, in and out of the Act, point to the conclusion that the Attorney-General of Ontario is the authority that must grant or refuse the *fiat* which is necessary to the real plaintiff here to pursue this remedy. I shall not be understood as speaking of the case where the Crown itself [298] seeks to avoid a patent; I speak only of the present case, where a subject domiciled in Ontario seeks to avail himself of the peculiar privileges of the Crown to assert his own private interests.]

SUPERIOR COURT.

1883
June 26.

GRIFFITH.....*Petitioner*;

AND

RIOUX *et al*.....*Respondents*.

[*Reported 6 Legal News, 211.*]

Intoxicating Liquors—Prohibition—Temperance Act of 1864.

A Provincial Legislature cannot repeal those sections of the Temperance Act of 1864, which relate to the prohibition of the sale of intoxicating liquors.

BROOKS, J.:—

This is a petition by Edward Griffith, asking that respondents, George E. Rioux, District Magistrate, and Allan D. G. Hazel, complainant, be restrained from proceeding with a prosecution brought before said District Magistrate in November, 1882, by said complainant Hazel, against said petitioner, for having on the 18th September, 1882, sold intoxicating liquors in quantity less than five gallons, contrary to the Temperance Act of 1864, 27 & 28 Vict. c. 18 (Dunkin Act), and asking the penalty prescribed by that Act, of $50; alleging:

1st. That said Act of 1864, was not in force in Richmond, and no such penalty as $50 existed. That the only penalty was $75, provided by Quebec License Act of 1878.

2nd. That petitioner had a shop license under hand of Revenue Inspector.

3rd. That if the Temperance Act of 1864 was ever in force in Richmond, it had ceased, by reason of incorporation of the Town of Richmond, under special charter, 45 Vict. c, 103, to form part of the territory of County of

Richmond, ceased to be bound by the by-laws of said County, and therefore the Temperance Act not in force there. That respondent Rioux had no jurisdiction to try the case, but had illegally proceeded to hear the evidence, and was about to render judgment, and was about to declare the License Act of 1870, so far as it repeals the 27 & 28 Vict. c. 18, and sect. 1086 of Municipal code, so far as it repeals said 27 & 28 Vict. c, 18, *ultra vires.*

The petitioner alleges, besides the repeal of all those portions of 27 & 28 Vict. c. 18, by Quebec License Act, 34 Vict. c. 2, sect. 12, under which the prosecution was brought, that he had a perfect right to sell, having obtained a shop license from the Revenue Inspector of the District; that in March, 1877, a by-law was enacted under Dunkin Act, so called, by which it was pretended that the sale of intoxicating liquors was prohibited within the limits of Richmond County, then including the now Town of Richmond, but on the 27th May, 1882, Richmond received special charter from the Legislature of Quebec, 45 Vict. c. 103, and since then, it has formed no portion of the County, and the said by-law has had no force there; that by its charter, Richmond had specially granted to it, the right to restrain, regulate or prohibit the traffic in liquor, and on 19th June, passed a by-law, regulating the license fee, and petitioner had paid the same as well as the government fees, and obtained a shop license, and that respondent Rioux had no right or jurisdiction to question the validity of repealing statutes, or investigate said case.

Respondent Rioux appeared and declared "qu'il s'en rapporte à justice."

Respondent Hazel persisted in his right to proceed under Temperance Act, alleging that this Act had never been repealed, *i. e.*, those portions under which he was proceeding, and that any action by the Legislature of Quebec, so far as it pretended to repeal any of said Act,

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Brooks, J.

was *ultra vires*; that it was specially provided by the charter of Richmond Town, 45 Vict. c. 103, s. 3, that "the by-laws, orders, rolls and municipal Acts, which governed the territory heretofore forming the Village of Richmond, shall continue in force until they are amended, repealed or replaced by the Town Council to be hereafter elected."

That no repeal of the Temperance Act had been had, and Richmond Town had no right, by by-law or otherwise, to authorize the issuing of licenses, or grant certificates, and their action was null in that respect; that the "Town Council to be hereafter elected," could not be elected under said Act until January, 1883, while the offence committed [212] was in November, 1882; that respondent Rioux did not exceed his jurisdiction in hearing said case; that license had no effect on prosecution: 27 & 28 Vict. c. 18, s. 12, sub-s. 2.

Petitioner Griffith filed amongst other documents, copies of license by-law of the Town of Richmond of June 19th, 1882, styled License By-law, authorizing collection of certain license fees, fixing $60 as fee to be paid for shop licenses. And the by-law of County Council, March 14th, 1877, prohibiting, under Temperance Act, sale of liquors in said County, with certificate of approval thereof on 19th April, 1877, by municipal electors.

No evidence is taken, but the judgment is sought upon the law as applicable to the case; and at the argument, it was stated by both petitioner and respondent that they desired a judgment upon the point as to the power of the Legislature to repeal the provisions of the Temperance Act, providing penalty and procedure for illicit sale of intoxicating liquors, and upon the power of the Legislature to do indirectly, *i.e.*, by granting the charter 45 Vict. c. 103, what, it was alleged, they could not do directly, confer upon the Town of Richmond, the right to restrain, regulate or prohibit the sale of any

spirituous, alcoholic, or intoxicating liquors within the limits of the Town; it being urged by petitioner that the by-laws of the Council of the 19th June, 1882, regulating sale, *i.e.*, fixing fees implied under their charter, repealed the County by-law, prohibiting the sale.

The first and main question is:

Had the Local Legislature a right to enact 34 Vict. c. 2, s. 197, by which those parts of 27 & 28 Vict. c. 18, which provide for penalties and procedure to enforce them, were repealed?

In order to determine this, it is necessary to examine the provisions of the B. N. A. Act, and see if this power could come under the class of subjects in sect. 92, with regard to which the Legislature was empowered exclusively to make laws. If so, it must be under sub-sects. 8, 9, 13 or 16.

The Temperance Act being in force at the time of confederation, remained so, until "repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament, or of that Legislature under this Act." (Sect. 129 B. N. A. Act.) It is contended that by the decision in Q.B., 1882, *Sulte* v. *The Corporation of Three Rivers* (1), in which Mr. Justice Ramsay declared: "We hold that, under a proper interpretation of sub-sect. 8, the right to pass a prohibitory liquor law for the purposes of municipal institutions, has been reserved to the Local Legislatures by the B. N. A. Act," it follows that the Legislature had the power to repeal the Temperance Act, but this, I think, does not at all follow, even if for the purposes of municipal institutions, the Legislature could prohibit. But it must be remarked that this case was that of Three Rivers incorporated prior to confederation *i.e.*, in 1857, and which by its charter had certain special

(1) 5 L. N. 330; *ante* vol. 2, p. 280.

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powers as to restrictions and conditions under which the inspectors should grant licenses, and so far as report goes no prohibition was actually made, but only an amendment to a by-law, fixing the fees. Can they repeal a law passed by the late Province of Canada, which declared what was the penalty for illicit sale, and prescribed the mode in which its payment should be enforced?

As against this decision we have the declaration of the Chief Justice of the Supreme Court in the case of the *City of Fredericton* (1). "When I had the honour to be Chief Justice of New Brunswick, the question of the right of the Local Legislature to pass laws prohibiting the sale or traffic in intoxicating liquors, came squarely before the Supreme Court of that Province, and that Court in the case of *Regina* v. *The Justices of King's County* (2), unanimously held that under the B. N. A. Act, the Local Legislature had no power or authority to prohibit the sale of intoxicating liquors, and declared the Act passed with that intent, *ultra vires*, and therefore, unconstitutional. I have carefully reconsidered the judgment then pronounced, and I have not had the least doubt raised in my mind as to the soundness of the conclusion at which the Court arrived on that occasion. I then thought the Local Legislature had not the power to prohibit; I think the same now."

In this judgment concurred Fournier, Taschereau and Gwynne, JJ., Henry, J., dissenting.

Taschereau, J., says; p. 557: "It is clear that the Canada Temperance Act, 1878, could not be enacted by the Provincial Legislatures, for the simple reason that they have only the powers that are expressly given them by the [213] B. N. A. Act, and that the said B. N. A. Act does not give them the power to effect such legislation."

(1) 3 Can. S.C.R. 505; *ante* vol. 2, p. 27.
(2) 2 Pugsley 535; *ante* vol. 2, p. 499.

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It would seem that if they could not pass the Canada Temperance Act of 1878, they could not have passed that of 1864, and Mr. Justice Ramsay says in *Sulte* v. *Three Rivers* (1), "I do not see how a Legislature has power to repeal what it cannot re-enact."

In the present instance they have repealed portions of the Act of 1864, "in so far as relate to matters within this Province and matters within the control of the Legislature of Quebec," and have made new provisions, increasing the penalty.

Does this come within either sub-sects. 8 or 9 of sect. 92 of the B. N. A. Act?

The legislation is certainly not municipal, because it merely says that for a violation of the By-law prohibiting altogether the sale, the penalty shall be for selling without a license, $75, instead of $50.

It cannot be contended that this is given for the purposes of municipal institutions, as the only way in which it could be so construed would be if the prosecution had been in the name of the municipality, but here it is by a private individual.

Again, it cannot be said to come under sub-sect. 9, as fines and penalties cannot be imposed "for the purpose of raising a revenue for provincial, local or municipal purposes."

It is not a matter of police regulation: See *Poulin* v. *The Corporation of Quebec*. Chief Justice Meredith says, and his judgment was sustained in appeal (2), "Considering that, although the Parliament of Canada, under the power given to it to regulate trade and commerce, alone has the power to prohibit the trade in intoxicating liquors, yet that the Provincial Legislatures, under the power given to them, may, for the preservation of good order in

(1) 5 L. N. 330; *ante* vol. 2, p. 280.

(2) 9 Can. S. C. R. 185; 7 Q. L. R. 337; *ante*, p. 230.

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the municipalities which they are empowered to establish, and which are under their control, make reasonable police regulations, although such regulations may, to some extent, interfere with the sale of spirituous liquors."

Ramsay, J., said: "It seems to me that this is purely a matter of police regulation, and consequently it is within the powers of municipal corporations, and that the exercise of such a power cannot be considered as being a restriction of trade and commerce."

Caron, J., held in *Hart* v. *The Corporation of the County of Missisquoi* (1), "Que, comme les pouvoirs accordés aux conseils de comté, par les dix premières sections de l'Acte de Tempérance de 1864, de prohiber la vente des boissons enivrantes, concernent l'industrie et le commerce, elles ne peuvent être ni modifiées, ni abrogées par la législature de la Province de Québec."

Upon this point there would seem to be little doubt. Section 91 of B. N. A. Act, sub-sect. 2, confers exclusively the regulation of trade and commerce upon Parliament.

The Supreme Court of Canada decided, in the case of the *City of Fredericton* (2), that under sub-sect. 2 of sect. 91 of B. N. A. Act, 1867, in regulation of trade and commerce, the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it.

In *Russell* v. *The Queen* (3) the Privy Council, in declaring the Temperance Act of 1878 within the power of Parliament, say: "Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question, whether its provisions also fall within any of the classes of subjects enumerated in

(1) 3 Q. L. R. 170; *ante*, vol. 2, p. 382. (2) 3 Can. S. C. R. 505; *ante*, vol. 2, p. 27.
(3) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

section 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, "the regulation of trade and commerce," enumerated in that section, and was, on that ground, a valid exercise of the legislative power of Canada."

The Provincial Legislatures have only such powers as have been conferred upon them by the B. N. A. Act, and the whole of the balance or residuum is in the Parliament of Canada.

The Privy Council has declared that Parliament has the right to legislate for the whole Dominion on the subject.

The Supreme Court of Canada has declared that Parliament has not only the right but the sole right to prohibit the sale of intoxicating liquors in the Dominion or in any [214] part of it. It is conceded that the Legislature cannot repeal what it cannot re-enact.

The power to prohibit is admittedly not exclusively conferred upon the Legislature, and not being exclusively given under the B. N. A. Act to the Legislature, Parliament can legislate.

The Canada Temperance Act, 1864, passed by Old Canada, could only be repealed by Parliament, as the first 10 sections have been by Canada Temperance Act, 1878. If there is any conflict of authority as to who shall legislate upon the subject, the Legislature must yield to Parliament. Parliament has legislated. It has declared as to what municipalities the Act of 1864 is repealed, *i.e.* the first ten sections. It has provided where it is not in force, new machinery for prohibiting; it has provided penalties for infraction of the law and procedure to enforce,

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and if it can do this, which the Privy Council has declared it can—the Local Legislature cannot have concurrent powers. Our Parliament must be supreme. Lord Carnarvon said in the discussion of his bill before the House of Lords: "That the authority of the Central Parliament will prevail whenever it may come in conflict with the Local Legislature, and any residue of legislation, if any, unprovided for in the specific classification, will belong to the central body." If this power belongs to Parliament, and it does, if it is not exclusively given to the Legislature, which is not pretended, the Legislature has, by License Act and its amendments, and by Municipal Code, Art. 1086, exceeded its authority.

I cannot, in deference to the decisions in this matter, declare otherwise than that the amendments to the Temperance Act of 1864 are *ultra vires*.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

H. B. Brown for petitioner.

J. J. Maclaren for respondents.

SUPERIOR COURT.

Ex parte Pillow.

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July 5.

[*Reported 27 L. C. Jurist, 216.*]

Nuisance, Power of legislation respecting—Municipal Institutions.

The power of the Parliament of Canada to enact a general law of nuisances, as incident to its right to legislate as to criminal law, is not incompatible with a right in the Provincial Legislatures to authorize municipal corporations to pass by-laws against nuisances hurtful to public health, as incidental to municipal institutions.

This was the merits of a motion to quash a conviction made on the 29th November, 1882.

The petitioners were occupants of a manufactory of cut nails, and it was complained that the chimney sent forth smoke in such quantity as to be a nuisance hurtful to public health and safety, and that they refused to remove and abate the nuisance, contrary to the by-law of the city of Montreal, No. 130.

The petitioners pleaded that the city had no jurisdiction to enact the by-law, and did not enact it in virtue of any competent legislative authority. The petitioners were convicted.

Torrance, J.:—

The main question as put by the petitioners is,—Had the Legislature of Quebec power to authorize the city of Montreal to pass the by-law? Such power, if it exists, must be derived from the sects. 91 and 92 of the Confederation Act, 1867. Sect. 91 enacts that "the exclusive legislative authority of the Parliament of Canada extends

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to" "the criminal law"; "and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Sect. 92 says that "in each Province the Legislature may exclusively make laws in relation to" "municipal institutions in the Province."

The petitioner contends that among the subjects assigned exclusively to the Parliament of Canada is the [217] criminal law, and that the subject matter of the by-law—a nuisance—is a matter of criminal law, referring to the text books on the subject. The city, on the other hand, contends that though the Federal Parliament has jurisdiction over nuisances in general, it does not follow that the local Legislatures cannot prohibit insalubrious or dangerous establishments in a Province, or that they cannot confer upon municipalities the right of self-protection and of protecting the citizens of a locality against the dangers of similar industries.

The by-law was made under 37 Vict. c. 51, s. 123, subsect. 2 (Quebec) Charter of Montreal, and 42-43 Vict. c. 53, s. 34, sub-sect. 8. The counsel for the city says that this power is comprised in the words "municipal institutions." If the city could not deal with these matters under its charter, the greater part of the municipal regulations would be *ultra vires*, and the municipalities would be incapable of repressing abuses affecting health or the security of citizens, and the words "municipal institutions" would have no meaning.

The discussions which have already taken place in our Courts respecting the liquor laws throw a good deal of light on the respective powers of the Dominion and Provincial Legislatures. In *Sulte* v. *The Corporation of*

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Three Rivers (1) it was held that the power of the Dominion Legislature to pass a general prohibitory liquor law, as incident to its right to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to pass prohibitory liquor laws as incident to municipal institutions; and in the case of *Poulin* v. *The City of Quebec* (2) Mr. Justice Tessier very pertinently asks the question, is it not part of the municipal institutions to make disciplinary and police regulations to prevent disorder on Sunday and at night, by compelling tavern and saloon keepers to keep their drinking places closed during that time? Can there be any question as to the power of our Local Legislature, or even our municipal corporation, to prevent the sale and storage of powder, except in certain places, and with certain precautions for the safety of the public? And, yet, this is a matter of trade like any other.

I am justified in concluding that the power of the Dominion Parliament to pass a general law of nuisances as incident to its right to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to pass the clause authorizing by-law 130 as incidental to municipal institutions.

Macmaster, Hutchinson & Weir, for petitioners.

R. Roy, Q.C., for respondent.

(1) 5 L. N. 330; *ante*, vol. 2, p. 280.
(2) 7 Q. L. R. 337; *ante*, p. 230.

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July 9.

SUPERIOR COURT.

MOLSON *v.* CHAPLEAU.

[*Reported 6 Legal News, 222.*]

Provincial Executive—Sovereign Authority.

The Members of the Executive Council of a Province, under the B.N.A. Act, represent the Sovereign, and cannot be sued in the Civil Courts of the Province for acts performed by them in the discharge of their official duty.

[*Translated.*]

PAPINEAU, J.:—

The plaintiff against whom proceedings have been taken for expropriating certain lands under the Quebec Railway Act, 1880, sues the Hon. J. A. Chapleau and the Hon. W. W. Lynch, the former as past Commissioner and the latter as the present Railway Commissioner of the Province of Quebec, as well as Messrs. Simard, Hutchison, and Brown, who have acted as arbitrators in the expropriation proceedings, for the purpose of causing the award of the arbitrators to be set aside and new expropriation proceedings ordered.

The defendants, the Hon. J. A. Chapleau and W. W. Lynch, except to the jurisdiction on the ground that they are improperly brought before this Court.

1. Because they are sued in their character of Quebec Railway Commissioners only, and as such they are not subject to the jurisdiction of this Court unless in case of misdemeanour or of crimes, of which there is no question in the case.

2. Because in this character they are members of the Executive Council and advisers of the chief of the State, the Lieutenant-Governor of the Province, and as such are

only the agents of the Government and responsible to the Lieutenant-Governor and the Legislature alone.

3. That it follows from the statement of the plaintiff, that it is in the name of Her Majesty our Sovereign, that these two defendants have performed the acts of which the plaintiff complains and that they cannot be brought before this Court for acts in which they have been only the advisers and agents of Her Majesty.

The plaintiff replies to this exception that these two defendants have not acted in the name of Her Majesty in the circumstances stated in his declaration; that these expropriation proceedings which have given rise to the present proceedings, having been commenced by the former and continued by the latter, these two defendants are triable by this Court under the circumstances disclosed in the declaration, which is only the result of the proceedings commenced by the said Hon. J. A. Chapleau, and an incident of these proceedings become necessary in order to their proper termination.

It is established by plaintiff's exhibit No. 10 (produced in the package of Exhibits No. 1245 between the same parties) that the expropriation proceedings were commenced by the said Hon. J. A. Chapleau officially in the name of Her Majesty.

The defendants have cited in support of their contentions the case of *Church* v. *Middlemiss* (1); *Gidley* v. *Palmerston* (2); Todd's Parliamentary Government, vol. 1, p. 299 *et seq.*; *Dickson* v. *Combermere* (3); Broom's Constitutional Law, pp. 241 and 617; *Unwin* v. *Wolseley* [223] (4); *Macbeath* v. *Haldimand* (5); *Attorney General* v. *Middlemiss* (6); *Mercer* v. *The Attorney General of Ontario* (7).

(1) 21 L. C. Jurist, 319.
(2) 3 B. & B. 275.
(3) 3 F. & F. 527.
(4) 1 T. R. 674.
(5) 1 T. R. 172.
(6) 19 L. C. Jurist, pp. 253, 256.
(7) 5 Can. S.C.R. 538; *ante* p. 1.

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The plaintiff maintains that the precedents cited are not applicable to the present case for several reasons (*a*) because in the cases of Haldimand and Palmerston the defendants were sued personally for acts done in their character of agents of Her Majesty, while in the present case the defendants, Chapleau and Lynch, are sued, not personally, but as commissioners and for acts done by them in that character, and that they are a *quasi* corporation. (*b*) Because Haldimand and Palmerston were really representatives of Her Majesty, while Messrs. Chapleau and Lynch were not; that Her Majesty the Queen is in her proper person, and by her representative, the Governor-General, an integral part of the federal Parliament, but that she does not personally or by her representative form part of the Legislature of the Province of Quebec; that this intentional exclusion of Her Majesty from the local Government of the Provinces which compose the Union formed in virtue of the B.N.A. Act, 1867, is plain to every attentive reader of this Act of the Imperial Parliament. Thus, the third and fourth paragraphs of the preamble of that Act deal not with a federation of the old Provinces, but purely and simply with the union of the Provinces. Section 3 speaks of one Dominion. The fourth says that the Union shall be formed; the Union shall be declared to have taken effect; and section 5, "Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick." The Dominion is a new creation of the law, and it is divided into four Provinces at the moment of its creation.

Is it a question of the distribution of powers? Sect. 9: "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen." The Chief Executive Officer called Governor-General or Administrator carries on the Government in the name of the Queen (Sect. 10). His Coun-

cil is styled the Queen's Privy Council for Canada (Sect. 11). In a word all the sections of this article 3 ["Executive Power"] up to section 16 inclusive, shew the Queen as retaining, with respect to Canada, the attributes of sovereignty.

Is it a question of legislative power? Article 4 ["Legislative Power"] embracing section 17 and the following sections confers this power on a Parliament composed of the Queen, the Senate and the Commons. What a contrast when we come to the share of power granted to each Province by article 5 "Provincial Constitutions—Executive Power," The Queen disappears. Sect. 58: "For each Province there shall be an officer styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada." This officer is not a deputy such as the Governor-General can nominate in the circumstances provided for in section 14. He is merely an officer; his council named by him is composed of the following officers: the Attorney-General, the Secretary and Registrar of the Province, the Treasurer, the Commissioner of Crown Lands, the Commissioner of Agriculture and Public Works, and, in the Province of Quebec, the Speaker of the Legislative Council and the Solicitor-General. If we pass on to the "Legistive Power," we do not find there any more either the Queen, or her representative or even a Parliament. Sect. 71: "There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of two Houses styled the Legislative Council of Quebec, and the Legislative Assembly of Quebec." Properly speaking this is nothing more than a big municipality.

Is a bill passed in the Houses of Parliament?—it is the Governor-General who assents to it, or withholds assent in the Queen's name, or reserves it for her personal assent (Sects. 55, 56). Has a Provincial Legislature passed a

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law ?—the assent, the withholding assent and the reservation, are no longer in the name of the Queen, but of the Governor-General and by the Lieutenant-Governor (Sect. 90).

The legislative powers are distributed so as to give the general and undefined powers in very comprehensive terms to the Parliament of Canada; on the other hand, the powers left to the Provincial Legislatures are special and in terms much less comprehensive (Sects. 91, 92).

Finally, when the Imperial Act deals with what is to be done by the Lieutenant-Governor, the name of Her Majesty appears only twice—namely, for the original appointment of legislative councillors, and the filling of vacancies (sects. 72, 75), and the summoning of the Legislatures, which the Lieutenant-Governor does in the name of Her Majesty (sect. 82). It is said this must be by accident, and this supposition is based on the fact that these expressions are applicable only to the Provinces of Ontario and Quebec. As regards the summoning of the Legislatures for Nova Scotia and New Brunswick, it is not so.

It follows, then, from all this, says the plaintiff, that Her Majesty, not forming part of the Provincial Legislatures, and the Act not having conferred on the Lieutenant-Governor the prerogatives of Her Majesty in express terms, they remain undiminished in the person of Her Majesty and cannot be exercised by the Lieutenant-Governors; the members of the Provincial Executive Council cannot call themselves representatives of Her Majesty, and as such, not under the jurisdiction of this Court.

The plaintiff admits that the defendant, Chapleau, took [224] his first proceeding in expropriation in the name of Her Majesty, but he asserts that this was done wrongfully, and he rightly adds that it is not enough for a person to call himself a representative of Her Majesty to make him so in reality.

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Let us consider the first reason of the plaintiff. The defendants, Chapleau and Lynch, are not sued personally, but as commissioners. Personally they have no interest in the case. Their character of commissioners implies a principal in whose name they act. If this principal is the Queen, she cannot be sued before this tribunal. If, on the contrary, the principal is a private person, private persons can only have judgment entered against them in their own names, except in the cases expressly provided by law. If they are a corporation it can only be a political corporation, for they form part of the executive government; they are the counsellors of Her Majesty, and then they are governed by the general law and cannot be brought before this tribunal, except in the cases expressly provided by the law.

The second reason is that the Queen does not form part of the executive government or of the Provincial Legislatures, from which she has evidently withdrawn, looking at the B. N. A. Act, 1867, as a whole; that the Lieutenant-Governor does not represent her, but represents the Governor-General, and the Ministers of the Lieutenant-Governor are not representatives of the Queen.

It has been properly said that the Queen cannot surrender any of her prerogatives, except by a law and in express terms. In like manner, and more properly, it may be said that the Queen cannot cease to be the personification of the sovereign authority in any part of the empire without a law of the Imperial Parliament, or an agreement in express terms to that effect. For, from the moment when it is no longer she who personifies the sovereign authority in every Province of the empire, that Province is no longer an integral part of that empire. Now, if the Queen has withdrawn, by the federal compact, both from the legislature and the executive of the Provinces, and if the Lieutenant-Governors are not her representa-

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tives, and do not exercise in her name and in her stead the authority which they exercise, these Provinces are no longer integral parts of the empire. The powers granted to the Provincial Legislatures are granted to them to the exclusion of the Federal Parliament. It is the same with the executive power. A certain number of these powers are rights of sovereignty, which can only be exercised by the Sovereign, or by her representatives in her name. Such are legislation over property and civil rights, the administration of justice, the constitution of the Courts, as well civil as criminal, etc. Either the Lieutenant-Governors and legislators act in their own name (then they are independent of Her Majesty), or they do so in the name of Her Majesty, and then they are her representatives.

If it is right to say that Her Majesty, in person, does not form part of the Provincial Legislatures and the Provincial Governments, it is equally right to say that she forms part of them by representation. For she cannot cease to form part of them, personally or by representation, without ceasing to be Sovereign of these Provinces. The representatives of the Sovereign cannot be brought before the Courts any more than she herself can, except when and as she allows. It is not by inadvertence that the law directs the Lieutenant-Governor to choose the legislative councillors and to summon the assemblies in the name of Her Majesty. This is in accordance with the very nature of the English constitution, of which ours are only copies.

But, says the plaintiff, I have been proceeded against by the Hon. J. A. Chapleau; the proceeding commenced against me is irregular; I have the right to have it so declared; I summon in my turn those who have commenced proceedings against me, and under the same names and descriptions; I do nothing more than continue

the proceeding already begun. This is true up to a certain point; but it must not be forgotten that, if the sovereign authority has the right to act against private persons in all the ways known for individuals amongst themselves, these last cannot act against the sovereign authority except in the manner permitted by it.

I use, intentionally, the words sovereign authority, because the same principles prevail, and ought to prevail, in all States, be they monarchical or democratic.

The plaintiff has maintained that Canada is not a federation, but a union of Provinces into a single Dominion with large municipalities springing out of it. The terms themselves of the preamble of the Act demonstrate that, if there is a union, it is a federal union: "Whereas, the Provinces of Canada, Nova Scotia and New Brunswick, have expressed their desire to be federally united," etc. Her Majesty and her Parliament have passed the Act of 1867 to carry out this desire. The Provinces also have granted to the Dominion a large part of the powers which belonged to them at the moment of union. But they have kept some powers which belong to them, to the exclusion of the Dominion which they have wished to form, and for which they have expressed the desire to contract their union. The Imperial Parliament only acts to give effect to the contract, the conditions of which were settled in the conferences of the Provincial delegates. The Imperial Act is only the solemn contract establishing the articles agreed to by the Provinces in the conferences which preceded the confederation. It ought then to be interpreted without losing sight of this historical fact.

The exception is allowed with costs.

R. A. Ramsay, for the plaintiff.

De Bellefeuille & Bonin, for the defendants.

1877*

NOVA SCOTIA SUPREME COURT—EQUITY.

Murdoch *v.* Windsor & Annapolis Railway Co.

[*Reported Russell's Equity Reports, 137.**]

Bankruptcy and Insolvency—37 Vict. c. 104, N. S.

An Act of the Nova Scotia Legislature for facilitating arrangements between Railway Companies and their creditors, provided that a company might propose a scheme of arrangement between the company and its creditors and file the same in Court and that thereafter the Court might, on application by the company, restrain any action against the company on such terms as the Court might think fit. The Act also provided that notice of filing the scheme should be published, and that thereafter no execution, attachment, or other process against the property of the company, should be available or be enforced without leave of the Court:

Held, by Ritchie, J., that the above provisions related to bankruptcy and insolvency, and were in excess of the powers vested in a Provincial Legislature (1).

The plaintiffs had security on the undertaking of the defendant company, future calls on shares and all tolls and money arising from the undertaking for £200,000 as a first lien. Messrs. Roberts, Lubbock & Co., an English firm, had a lien on the rolling stock for £25,000, and there were about £70,000 due to unsecured creditors. The defendants, under chapter 104 of the Acts of 1874 of the Legislature of Nova Scotia, entitled "An Act to facilitate arrangements between Railway Companies and their

*[This volume of Reports "is supposed to contain all the decisions delivered by Mr. Justice Ritchie, as Judge in Equity for the Province of Nova Scotia," during the years 1873-1882. In the report of this case, the date of the delivery of the judgment is not given. The nearest preceding case in which a date is given has the date 1877, and that date has, therefore, been adopted in the present report.]

(1) [See *Re Windsor and Annapolis Railway*, *post* p. 387.]

Creditors," filed a scheme whereby preferential stock to the extent of £75,000 was to be created, to be a first charge on both the undertaking, calls, tolls, etc., and the rolling stock, and this, or the money coming from it, was to be applied to the payment in full of Messrs. Roberts, Lubbock & Co., and certain unsecured debts specified; stock to the extent of £350,000 was then to be created, to be a subsequent charge on the undertaking, etc., and rolling stock, and was to be issued at par to the existing debenture holders in lieu of the debentures they then held, which were to be delivered up to be cancelled [138]. The plaintiffs obtained an order for the appointment of a receiver, which the defendants obtained a rule *nisi* to rescind.

RITCHIE, EQUITY JUDGE:—

The plaintiff, on the 16th November last, obtained an order *nisi* for the appointment of a receiver, which was on the 28th December last, after argument, made absolute, and on the 2nd February last William Twining was appointed receiver to collect and receive the tolls and sums of money arising from the Windsor & Annapolis Railway Company, and to pay them over to the plaintiff till the amount due him by the company on the mortgage debentures, the subject of the suit, and his costs should be fully paid, with leave to apply to the Court for further directions, who, after having given the required security, entered upon the duties of the office. On the 15th March last an application was made by Mr. Henry on behalf of the company, to rescind the order appointing Mr. Twining receiver, and to annul his appointment, and he obtained a rule *nisi* to that effect, which was argued on the 29th March. The rule *nisi* was obtained on the affidavit of Mr. Henry that a scheme of arrangement between the company and their creditors

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had been filed in the Supreme Court at Halifax on the 12th day of February last, notice of which had been duly published under and in compliance with the provisions of an Act of the Province of Nova Scotia, entitled "An Act to facilitate arrangements between Railway Companies and their Creditors," (1) and it was further stated that he (Mr. Henry) had been informed by the secretary of the company in London, and fully believed, that the scheme had been assented to by three-fourths in value of the creditors of the company.

In shewing cause it was contended on the part of [139] the plaintiff that the Legislature had exceeded its power in passing the Act referred to, as it dealt with a subject over which the B. N. A. Act conferred on the Parliament of Canada exclusive power of legislation, bankruptcy and insolvency being among the enumerated classes of subjects with which that Parliament alone can deal; and that this Act could be considered in no other light than as an Insolvent Act. It was also contended that if the Local Legislature had authority to pass the Act the scheme proposed was so unreasonable in its provisions that by merely filing it the plaintiff should not be restrained from obtaining the benefit of the judgment he had obtained and from his remedy for the recovery of the debt due him by the company. It was also urged that the application, if made at all, should have been made sooner.

The following sections of the Act bear more particularly on the question involved, viz., the 2nd, 3rd, 4th and 5th: Sect. 2nd, "A company may propose a scheme of arrangement between the company and their creditors (with or without provisions for settling and defining any

(1) See page 1 of the Acts of 1875, where this Act is placed as cap. 104 of the Acts of 1874, having been reserved for the assent of the Governor-General.

rights of shareholders of the company as among themselves, and for raising if necessary additional share and loan of capital or either of them), and may file the same in the court." Sect. 3rd, "After the filing of the scheme the Court may, on the application of the company on summons or motion, in a summary way, restrain any action against the company on such terms as the Court thinks fit." Sect. 4th, "Notice of filing of the scheme shall be published in the *Gazette* and in two other newspapers published in the City of Halifax." Sect. 5th, "After such publication of notice no execution, attachment, or other process against the property of the company shall be available or be enforced without leave of the Court, to be obtained on summons or motion in a summary way."

These provisions as well as the other provisions of the Act have been transcribed from sections of the Imperial Statute, 30 & 31 Vict. c. 127, but in transcribing the second section of the Nova Scotia Act from the sixth of the Imperial Act, with which in other respects it is identical, these words at the commencement of the sec-
[140] tion are omitted: "Where a company are unable to meet their engagements," and at the close of it [sect. 6 of the Imperial Act] the company is required to file a declaration in writing that it is unable to meet its engagements, with an affidavit of the truth of such declaration.

Had these words been transcribed into the Act in question it would have appeared on the face of it that it treated of a subject over which the Provincial Parliament had no power of legislation, and it would doubtless have been rejected as *ultra vires*. It is of little importance, however, whether an Act does or does not profess in terms to deal with insolvency; the question is, does it in fact deal with that subject? If power is taken from

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creditors to pursue their ordinary legal remedies for the recovery of debts due them, whether by companies or firms or individuals, or they are compelled without their consent to give time to their debtors, or to forego securities which they hold, and postpone a priority of lien which they possess to parties who may be willing to advance money to their debtors to meet pressing necessities, surely such legislation can only be predicated upon such debtors being unable to meet their liabilities, or in other words, being insolvent. That a company having become insolvent, in order to settle with all its creditors alike, should have the power of declaring itself such, and on such declaration the remedies of creditors should be suspended, is not unreasonable; but that the Legislature should give to a company solvent and able to meet all its liabilities, the power of staying all proceedings against their creditors by merely proposing and filing a scheme of arrangement with them, would be incomprehensible. The legislation must have been based upon the assumption of the insolvency of the company; the whole of the provisions of the Act can lead to no other conclusion; and the company itself has so regarded it, for the scheme which they have filed is preceded by this recital, "and whereas the company are unable to meet their engagements with their creditors."

But assuming that validity is to be given to the Act, yet, where an application is made to the Court to stay the proceedings of creditors, reference must be had to the terms of the scheme, for it could hardly have been contended that the application must necessarily be successful because a scheme, however unreasonable in its [141] character, had been filed. In any such scheme the various classes of creditors must be fairly treated, and it should shew a reasonable prospect of providing for the ultimate payment of their claims.

[The learned Judge after considering the proposed scheme, the object of which was in his opinion to secure as far as possible the other creditors of the company at the expense of the present debenture holders, proceeded:]

Entertaining as I do a strong opinion that the Local Legislature in passing the Act exceeded its powers, and that the scheme does not deal fairly with the present debenture holders, I cannot comply with the application which has been made on behalf of the company, and [142] must discharge the rule *nisi* with costs; but as both the questions I have been considering will properly come before the whole Court in term, when it is possible a different view may be taken of them, I am disposed so far to modify the order appointing the receiver, as to direct him to pay the amount to be received by him to the Receiver-General of the Court, there to abide the further order of this Court if this course should be desired on the part of the company.

NOVA SCOTIA SUPREME COURT—EQUITY.

1881*

In Re The Wallace Huestis Grey Stone Co.

[*Reported, Russell's Equity Reports, 461**].

Bankruptcy and Insolvency—Winding-up Act—Rev. Stat. N. S. (5th series) c. 80.

By an Act of the Legislature of Nova Scotia provision was made for the winding-up of companies in general, where a resolution to that effect was passed by the company, or where the Court so ordered at the instance of a contributor, on its being made to appear that such order was just and equitable. The Act could be enforced although no debts were due by the company, but could not be called into operation by a creditor:

Held, that the Act did not partake of the character of an insolvent law, and was within the legislative authority of a Provincial Legislature.

Proceedings were taken under an Act of the Provincial Legislature to wind up the company, on the ground that it was heavly embarrassed, and could not extricate itself without having recourse to the double liability of the shareholders. The Act of incorporation provided that transfers of shares should be valid and effectual for all purposes, from the time they were made and entered in the books of the company.

Three of the shareholders claimed that they were not contributories, on the ground that certificates of stock were never accepted by them, but it appeared that the

*[This volume of Reports "is supposed to contain all the decisions delivered by Mr. Justice Ritchie as Judge in Equity for the Province of Nova Scotia," during the years 1873-1882. In the report of this case the date of the delivery of the judgment is not given. The nearest preceding case, in which a date is given, has the date 1881, and that date has therefore been adopted in the present report.]

certificates were issued to them by direction of the former stockholders, from whom they were transferred, that this was approved of by the directors, and the certificates were handed to the transferor and afterwards received by two of the transfereers, who were registered as stockholders in the company's books, and never repudiated the transaction. The third transferee was also registered, and was elected a director previous to his repudiating the transaction, which he did not do until after it became apparent that the affairs of the company were embarrassed. Another class of stockholders claimed to be exempt, on the ground that they had surrendered their shares to the company. This surrender had been made and accepted by the company, but the parties surrendering knew that the affairs of the company were embarrassed, and it was with a view of escaping liability that the surrender was made (1).

RITCHIE, EQUITY JUDGE:—

The application for the winding up of this company, is made on behalf of shareholders, on the ground that it has incurred heavy responsibilities, and that it is impossible to extricate itself from its present embarrassment and meet its liabilities, without having recourse on its members, under the double liability clause of the Act under which it is incorporated, and that any attempt to continue its business would result in further loss.

The only objections to the proceedings, which have been taken, are made by certain persons who deny their liability as contributories; who also insist that, though they should be held to be liable, the proceedings are invalid, inasmuch as the Act of the Provincial Legislature, under which they are taken, is unconstitutional and *ultra vires*,

(1) [The statement is taken from the head note to the case as reported.]

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as dealing with insolvency, a subject over which the Dominion Legislature has alone the power of legislating.

[462] As this last objection lies at the root of the matter, I shall consider it first. The Act does not in terms profess to deal with insolvency, nor is it in its character an insolvent law. The object of such a law is to relieve honest debtors who are unable to pay their debts, and to make a fair distribution of their property among their creditors in discharge of their debts.

The object of this Act is to wind up the affairs of companies in general, where a resolution to that effect has been passed by the company, or where the Court may so order it, as in the present case, on the application of a contributor, on its being made to appear that it is just and equitable that it should be done. This may take place though no debts whatever may be due by the company; and this Act, unlike the English Act on the same subject, cannot be called into operation by a creditor of the company. Under the Act incorporating this company, its members are made liable for double the amount of stock held by them. No more than the subscribed stock has been paid up, and there is nothing to lead to the inference that the amounts for which the members are still liable will not be sufficient to pay all its indebtedness. It is with the view of having these amounts collected and so applied, and thus avoiding insolvency, that these proceedings have been taken. I think, therefore, that the Act under which they have been taken does not trench upon the legislative powers of the Dominion Parliament; so that those who rely on this ground alone, must be held to be contributories.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

NOVA SCOTIA SUPREME COURT.

TOWN OF WINDSOR *v.* THE COMMERCIAL BANK OF WINDSOR.

1882*
Dec. 18.

[*Reported 3 Russell and Geldert 420.*]

Taxation of Banks—B. N. A. Act, s. 91, sub-s. 15.

A Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve under the Dominion Act relating to "Banks and Banking" (34 Vict. c. 5, s. 14).

This was a case stated for the opinion of the Court in the following terms:—

The parties hereto agree to submit the following case without pleadings to the Supreme Court at Halifax, for their decision thereon, and agree to be bound by the decision given herein, by the said Supreme Court.

[421] The defendant Bank is doing business under the general Banking Act of the Dominion of Canada, and has its office, and does business in the Town of Windsor.

The bank, in addition to real and other personal property held and owned by it, owns and holds notes of the Dominion of Canada to the amount of eleven thousand seven hundred and fifty-nine dollars, which notes are held as a portion of its cash reserve, as required by the Act relating to Banks and Banking.

The assessors for the Town of Windsor have assessed the said bank the sum of twelve hundred and fifty dollars on real estate, fifteen hundred dollars on office furniture and safes, eighteen thousand two hundred and

* Present:—McDONALD, SMITH, JAMES and WEATHERBE, JJ.

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forty-one dollars on specie held by the said bank, and, also, eleven thousand seven hundred and fifty-nine dollars on said Dominion of Canada notes, being the amount of said notes so held by said bank, and the said bank has been rated the sum of three hundred and twenty-seven dollars and fifty cents for taxes thereon.

The bank is willing to pay the taxes rated and assessed on it in respect of real estate, office furniture, and safes and specie held by it, viz.: the sum of two hundred and nine dollars and ninety-one cents, but refuses to pay the tax rated and assessed on said Dominion of Canada notes, viz.: the sum of one hundred and seventeen dollars and fifty-nine cents.

The question for the opinion of the Court is, whether or not the said bank is liable to be so assessed for taxes on the Dominion of Canada notes so held by the said bank.

If the Court decide that the bank is liable to be assessed on said Dominion of Canada notes, judgment to be entered against the defendant for the plaintiff for the sum of one hundred and seventeen dollars and fifty-nine cents, and costs, otherwise judgment to be entered for the defendant against the plaintiff for costs.

It is further agreed that this case shall not stay or interfere with the collection of rates and taxes assessed and levied on other property held by the said bank, and the payment by the said bank of any sum or sums of money on account of its taxes shall not affect or prejudice this case.

[422] The printed by-laws of the Town of Windsor may be referred to as if forming part of this case.

E. W. DIMOCK,

Warden.

W. M. CHRISTIE, *Atty. for Town of Windsor.*

WALTER LAWSON, *Cashier, Com. Bank of Windsor.*

AUBREY BLANCHARD, *Atty. of Com. Bank of Windsor.*

The case was argued December 19th, 1881, by *Graham*, Q. C., on behalf of the Town of Windsor, and *Rigby*, Q. C., on behalf of the Commercial Bank.

Graham, Q. C.

Under the B. N. A. Act, Dominion notes in the hands of parties may be assessed. The first Act in reference to Dominion notes is the Act of 1868, page 46; the next is the Act of 1870, page 40; and the last, the Act of 1880, chapter 13. There are some other Acts, which are not material. The Banking Act is contained in Acts of 1871, cap. 5, sects. 11, 14. Under sect. 125 of the B. N. A. Act, no lands or property belonging to the Dominion can be taxed. It cannot be said that these notes which the Dominion Government have exchanged for gold and other [423] things belong to the Dominion Government: *Bank* v. *Supervisors* (1). In this case United States notes were held exempt from taxation, but this was under a special Act to that effect, and it may be inferred from the case, that if it had not been for this Act the notes would have been taxable as money. In Burroughs on Taxation, 120, a great many of the United States cases are discussed.

Rigby, Q. C., contra, cites B. N. A. Act, sect. 91, as to the exclusive powers of the Dominion Parliament. Subsect. 15 enumerates among these subjects, "banking," the "incorporation of banks," and the "issue of paper money." Under this the Dominion Government have passed a Banking Act, under which a portion of the capital of each bank is tied up. They say the banks must keep in their vaults a certain portion of their capital, half of which must be in Dominion notes. If the right of the Local Legislature to tax this is conceded, there is no limit to the extent to which it may do so, and it may

(1) 7 Wallace 26.

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so hamper the operations of the banks as to prevent them from carrying on their business. Such a power would be inconsistent with that possessed by the Dominion Parliament; Doutre on Constitution of Canada, 393. Under sect. 91, B. N. A. Act, I contend that the Dominion Government, having exclusive power, the Local Legislature cannot impose a tax on the means used by them for the purpose of carrying on their operations. The legislation by the Dominion Parliament, that the banks shall keep a reserve of 20 per cent., is inconsistent with any right of the town to impose a tax on that reserve. I also take the general ground that this is a tax on the borrowing power of the Dominion, which is one of the means of carrying on business. (Weatherbe, J.: I do not see where you can draw the line. According to your contention, the Local Government would have no power of taxation at all.) I do not need to go so far as that. In *Leprohon* v. *City of Ottawa* (1), the principle laid down in the United States cases was recognised. In that case it was held that the income of a civil servant of the Dominion Government was not liable to taxation under local Acts. *McCulloch* v. *Maryland* (2), goes fully into the whole [424] question. *Desdelens* v. *Commissioners Erie County* (3); *Weston et al.* v. *Council of Charleston* (4). In this case it was held that a tax could not be levied on stock of the United States held by an individual. See on same point *Bank of Commerce* v. *New York City* (5); *Osborn* v. *United States Bank* (6); *Bank Tax Case* (7). The latter case is much like the present. Sedgewick on Statutes, 507, note.

Graham, Q.C., in reply.—In the cases cited the banks

(1) 2 App. Rep. 522; *ante* vol. 1, p. 592.
(2) 4 Wheaton, 316.
(3) 16 Peters, 443.
(4) 2 Peters, 449.
(5) 2 Black, 620.
(6) 9 Wheaton, 738.
(7) 2 Wallace, 200.

were discriminated against in the taxation. *McCulloch* v. *Maryland* (1) is the leading case. It was sought to apply a different rule to the banks from that which was applied to individuals. The Dominion Government can refuse their assent to any Act imposing a tax which would destroy a bank. If the Dominion Government have the right to say that the notes shall not be taxed, they have not exercised it. There can be no objection to a tax on these Dominion notes, provided a greater tax is not imposed on them than on other moneys. The fact of this being a reserve fund may add a little moral force to the argument, but there is no legal distinction between this money and any other. If the notes were not there, the bank would have to have gold. *National Bank* v. *Commonwealth* (2); *Board of Commissioners of Montgomery County* v. *Elston* (3).

The judgment of the Court was delivered by

WEATHERBE, J.:—

The liability to pay the assessment in question depends upon the interpretation of the clauses of the B. N. A. Act respecting the distribution of powers. It is not disputed that the bank is liable to be assessed for its specie, but the contention is that it is not liable for assessment on, and the Province can confer no power upon the municipality to levy an assessment upon, notes of the Dominion of Canada, held by the bank as a portion of its cash reserve, as provided by the Act. The Province has the power, exclusively, to make laws in relation to municipal institutions in the Province, and I suppose it cannot be disputed that this confers general power to impose taxation upon the property and persons within the municipal district for municipal purposes, except in

(1) 4 Wheaton, 316. (2) 9 Wallace, 353. (3) 2 American Rep. 327.

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cases of exemption under the B. N. A. Act. By sect. 125, [425] no lands or property belonging to Canada, or any Province, shall be liable to taxation. It cannot be said that these notes in question are the property of Canada, and, therefore, no exemption can be claimed under that clause.

It is argued, however, inasmuch as "banking, incorporation of banks, and the issue of paper money," form a class of subjects to all matters coming within which the exclusive legislative authority of the Dominion extends, that the power of the Province to authorise taxation for municipal purposes is limited by this language, and the assessment cannot be held to be operative against the notes in question. This mode of reasoning would preclude the plaintiff from levying taxes upon the real estate, or any other property, of the bank. The same reasoning might be held to exclude other property under the classes of subjects, "Navigation and Shipping," "Currency and Coinage," "Bills of Exchange and Promissory Notes," and perhaps the "Regulation of Trade and Commerce." "Exclusive" power in the Dominion to regulate banking by legislation does not seem to me to exclude the power of the Province to authorise assessment. The same may be held of incorporation of banks, because, if not, the property of all corporations created under Dominion legislation would be exempt from all control of the Province. The issue of paper money comes nearer the line. Does the exclusive power in the Dominion to legislate on all matters within this subject, "the issue of paper money," limit the taxing power of the Province, so as to exempt this paper money in the hands of a holder from the operation of a general assessment law? In the first place, can the Dominion legislate to exempt the paper money issued by it from taxation? Although the word "exclusive" might seem, in such case,

out of place, and inconsistent with the intention also to give "exclusive" power to the Province to impose taxation in cases where no legislation to exempt has been passed by the Dominion, still there may be room for discussion on the point. As it is not by reason of right to legislate respecting banking, that it could be said Parliament derives power to exempt paper money from taxation, such paper would be free from taxation, not in the bank alone, but in the hands of everyone; moreover, the right to exempt all money, ships, bills of exchange, and, I suppose, all [426] articles of trade and commerce, would exist by the same general language in the one case as in the other. I think, therefore, that it was not the intention, in framing sect. 92, which gives exclusive power to the Province to tax and to make laws relating to municipal institutions, to limit that power by the language of sect. 91, in the manner here contended for. I do not wish to be understood as offering an opinion as to whether there may not be power in the Dominion, by legislation, in issuing paper money, to give that money a character by which it may, perhaps, by being property of the Dominion, be exempt from taxation.

It was said at the argument that sect. 125, B. N. A. Act, exempting lands and property of the Dominion and the Provinces from taxation, manifested a design that no other property should be exempt from assessment; but I think it does not follow that because in the Act there were words selected to afford mutual exemption for the Dominion and the Provinces, that other words might not consistently be introduced to give power to either of the legislative bodies to exempt in certain cases. It is true enough that, though the right of exclusively making laws in relation to Provincial municipalities is given to the Province, words might be found to modify and subject that right to the Dominion powers, but the conclusion

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can hardly be drawn from the words of these two sections, distributing the powers of legislation, that it was the intention to prevent the Province from subjecting the "property in the Province" of every inhabitant to the burdens necessary for sustaining municipal institutions. The construction contended for would, it appears to me, lead to endless confusion. All that I think necessary in this case to hold is that all property, except that of the Dominion or the Province, may be made equally liable to assessment for municipal purposes by Provincial legislation. This does not seem to me to be a question relative to banks or banking.

By the Act in question, the bank is required to hold the portion of the notes sought to be relieved from the assessment in lieu of that amount of its reserved capital. I do not understand that any force is to be derived from that Act to assist defendant's contention. If the notes are to be exempt, they are exempt, because, being paper issued by the Dominion, the Parliament has exclusive power to legislate. So far, I have dealt only with the [427] construction of the words. The difficult point, it was suggested, was to determine whether there are not implied powers in the Dominion Parliament limiting the right of the Provincial Legislature. Our attention was directed, therefore, to another argument. The issue of these notes, we were told, is a part of the machinery for carrying on the Government of the Dominion, and the local power cannot interfere with it. This argument is adopted from the United States of America, where it has been held that the State Governments have "no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers, nor to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the National Government." 1 Kent's Com. 425.

This doctrine was established by Chief Justice Marshall in the great case of *McCulloch* v. *Maryland* (1), and avowedly on the principle of self-preservation, because the power to tax would involve the power to destroy, and the power to destroy might defeat and render useless the power to create. The clause in the constitution, declaring that the laws made in pursuance thereof should be the supreme law of the land, was relied on in pronouncing judgment, restricting the taxing power of the State by a superior unapplied power in the general Government Considering the discussion already had in Ontario and New Brunswick, our task might be a more difficult one were we called on to say whether this reasoning, the argument drawn from the peril of the Supreme National Government, if sound, applies to our condition and existence under an Imperial Act, which may be amended or modified by the Imperial power. I think this case, even assuming the soundness of the doctrine referred to, and that it may be applied where like cases occur, does not come within the principle contended for. This is not the case of a national bank, and it is not, it seems to me, a case where a question of the right under Provincial legislation to control the measures of the Dominion Government arises. By sect. 14 of cap. 5, 34 Vict., the bank shall always hold, as nearly as may be practicable, one-half of its *cash* reserves in Dominion notes, and the proportion of such reserves held in Dominion notes shall [428] never be less than one-third thereof. It is, as has been already said, admitted that the specie is taxable, but not the notes substituted under the Act. These notes are not the property of the Dominion Government, but the property of the bank, a corporation with no more legal rights to exemption than any individual tax-payer. Upon this ground, and without offering an opinion upon

(1) 4 Wheaton, 316.

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the power of the Dominion to restrict the right of the Province to authorise a general assessment, I think the judgment should be for the plaintiff. The defendant must pay the costs.

McDONALD, J., concurred.

SMITH, J.—I am of opinion that the bank is liable to be assessed on Dominion notes as well as other paper, or specie, they being the property of the bank, and not of the Dominion Government; and their liability to assessment cannot in any way affect the banking or other interests of that Government.

NOVA SCOTIA SUPREME COURT.

Re Windsor & Annapolis Railway.

1883
April 9.

[*Reported 4 Russell & Geldert, 312.*]

Bankruptcy and Insolvency—Property and Civil Rights—37 Vict. c. 104, N.S.

Under the provisions of an Act of the Legislature of Nova Scotia, "to facilitate arrangements between Railway Companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B debenture stock of the Company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted:

Held (Weatherbe, J., dissenting), that so much of the Act as was necessary to the confirmation of the proposed scheme, was within the legislative authority of the Legislature of Nova Scotia (1).

Henry, Q.C., having moved, on a previous day, for a confirmation of a scheme of arrangement between the Windsor & Annapolis Railway Company and its creditors, was called upon to discuss the competency of the Local Legislature to pass the Act under which the confirmation of the scheme of arrangement was sought to be obtained. The Act was passed in the Session of 1874, and reserved for the sanction of the Governor-General. That assent having been given, it was published in the Acts for the following year, and appears in the Local Acts of 1875, as chapter 104 of the Acts of 1874.

The following was the proposed scheme of arrangement:

(1) [See *Murdoch* v. *Windsor and Annapolis Ry. Co.*, *ante* p. 368].

1883

RE WINDSOR & ANNAPOLIS RAILWAY.

STATEMENT.

Scheme of Arrangement

Between the Windsor & Annapolis Railway Company and their creditors, proposed by the Company, in pursuance of the provisions of an Act of the Legislature of the Province of Nova Scotia, assented to on the 12th December, 1874, and intituled "An Act to facilitate arrangements between Railway Companies and their Creditors."

Whereas, the Company were constituted and incorporated by an Act of the Legislature of Nova Scotia, passed the 7th May, 1867, and (having been formed and registered [313] under the style of the Windsor & Annapolis Railway Company, Limited, as a joint stock company in England, in conformity with the provisions of the statute of the United Kingdom (called "The Companies' Act, 1862,") were further regulated by an Act of the Legislature of Nova Scotia, passed the 14th June, 1869;

And, whereas, the creditors of the Company include the holders of certain securities of the Company respectively distinguished as A debenture stock, which bears interest at the rate of £6 per cent. per annum, and the issue of which to the amount of £75,000 was authorized by the provisions of a scheme of arrangement, dated the 26th January, 1875, proposed by the Company, and subsequently duly filed, confirmed and enrolled in conformity with the provisions of the said Act of the 12th December, 1874; and B debenture stock, also bearing interest at the rate of £6 per cent. per annum, and authorized and issued to the amount of £350,000 under the provisions of the aforesaid scheme of arrangement of the 26th January, 1875;

And, whereas, under the provisions of the aforesaid scheme of arrangement, the interest on the said B debenture stock became and is charged as a first charge on the net income of the Company, subject only to the interest

on the said A debenture stock, and the payment of such interest may be enforced by the appointment of a Receiver;

And, whereas, the net income of the Company has been and is insufficient to pay the interest on the said B debenture stock, and the arrears now due and unpaid in respect of such interest, with the amount to become due to the 1st October, 1882, will amount to the sum of £70,000, and the accumulation of such arrears is injurious to the interests of the Company and their creditors and shareholders;

And, whereas, the amount of the share capital of the Company as at present authorized is £500,000, in shares of £20 each, of which there have been issued 15,075 shares, amounting to £301,500, all of which are fully paid up;

And, whereas, having regard to the circumstances aforesaid, it will be for the advantage of the Company and their said creditors and shareholders that the liabilities and the existing capital of the Company as to so much of their loan capital as consists of the said B debenture [314] stock, and as to their existing share capital shall be re-adjusted in manner hereinafter provided, so as to effect a new security and provision for the said holders of the said B debenture stock, which shall be more beneficial to them and also to the Company and their shareholders than the existing security;

Now, therefore, the Company, in pursuance of the provisions of the said Act of the Legislature of Nova Scotia, intituled "An Act to facilitate arrangements between Railway Companies and their Creditors," have prepared and propose the following scheme of arrangement as between them and their creditors:—

1. As from the date of the filing of this scheme (but subject to the confirmation and enrolment thereof in due course) in pursuance of the said Act, the said B debenture

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stock for £350,000, and the securities, rights and interests theretofore subsisting in respect thereof, including all arrears of interest thereon and all certificates of indebtedness issued by the Company in respect of such arrears, shall become and be abrogated and determined, and in lieu thereof the holders of such B debenture stock shall be entitled to such new debenture stock and to such preference shares in the Company as hereinafter provided for.

2. Immediately upon this scheme being enrolled there shall be created and in due course thereafter issued by the Directors of the Company, new B debenture stock to the amount of £200,000 (being the amount of 50 per cent. of the capital of the existing B debenture stock, and about 35 per cent. of the arrears of interest thereon as aforesaid), which shall bear interest as from the 1st October, 1882, after the rate of £4 per cent. per annum, and be payable half-yearly on the 1st April and 1st October.

3. The new B debenture stock shall be a first charge upon the undertaking and rolling stock of the Company (including their right and interest in any line of railway other than their own line which they are or may become entitled to, by lease or to work, under any agreement or running powers), subject only to the said A debenture stock; and the interest on such new B debenture stock shall be the first charge on the net income of the Com-
[315] pany accruing from the 1st October, 1882, subject only to the payment thereout of the interest on the A debenture stock. Provided always, that the said charge in respect of the interest of the new B debenture stock may be enforced (as if the same were interest on ordinary debentures of the Company), by means of a Receiver of such net income on behalf of the holders of the new B debenture stock, in case the interest thereon shall not be

punctually paid, or in case the possession by the Company of their railways and undertaking, or the receipt of the revenues thereof, may be interfered with or endangered so as to prejudice or endanger the security of the holders of the new B debenture stock.

4. Immediately upon this scheme being enrolled there shall be created and in due course issued as hereinafter provided, preference shares of the Company to the amount of £220,500 (being the amount of 50 per cent. of the capital of the existing B debenture stock, and of 65 per cent. of the arrears of interest thereon), and there shall also be issued, as hereinafter provided, new ordinary shares of the Company to the amount of £100,500.

5. The said preference shares shall bear, and the holders thereof shall be entitled to, dividend on the amount thereof after the rate of £5 per cent. per annum, as from the 1st October, 1882, payable half-yearly out of the net income of each current year after that date, in preference and priority to any dividend in respect of any of the ordinary share capital of the Company, but so that the deficiency of any year shall not be paid or made good out of the income of any succeeding year, and upon any return or repayment of share capital by the Company the amounts of the said preference shares shall be paid in preference and priority to any of the ordinary share capital. The holders of the said preference shares shall be entitled to one vote in respect of every such share held by them respectively.

6. The said preference shares and new ordinary shares shall be issued as fully paid up shares of £20 each, and shall be allotted and issued ratably (as to the preference shares), to and amongst the registered holders of the existing B debenture stock, and (as to the new ordinary shares), to and amongst the holders of the existing shares [316] of the Company, in proportion to their respective

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holdings of such debenture stock and shares respectively. In order to admit of such proportionate allotments being exactly made, the Directors may, as to a sufficient number of the said preference and new ordinary shares respectively, make such arrangements for the issue of scrip certificates, subdivided shares or stock, or otherwise, as may be requisite or convenient for that purpose.

7. Immediately upon such new ordinary shares being allotted as aforesaid to the said shareholders of the Company, the shares theretofore held by them respectively, and the certificates thereof, and all entries in the Registers of the Company with respect thereto, shall be cancelled.

8. From and after the next ordinary general meeting of the Company, after the enrolment of this scheme, the additional Directors of the Company heretofore appointed and acting under the provisions of the aforesaid scheme of the 26th January, 1875, as B debenture stock Directors shall cease to be or to act as such Directors, and no new Directors shall be appointed in their place or otherwise, as B debenture stock Directors.

Henry, Q.C.,—As to effect of Insolvent Laws, cites Bouvier's Law Dictionary. In the United States the subjects of bankruptcy and insolvency are regarded as exclusively under the power of Congress. A State Legislature is disabled from passing laws impairing the obligation of contracts. Cites *L'Union St. Jacques de Montreal* v. *Bélisle* (1). The view is sanctioned by this case that an Act which does not provide for the distribution of the assets of a concern is not an insolvent or bankrupt Act. The Act here falls short of the leading provisions of a bankrupt Act, viz., the cession of the property of the bankrupt and the division of his goods among his creditors. The matter is *prima facie* within the power of

(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

the Local Legislature, and must be so construed, unless controlled by the principle in regard to bankruptcy. The Act we are discussing falls short of Acts which must be considered to be Acts on the subjects of bankruptcy and insolvency, as the terms must be understood to have been used by the B. N. A. Act. The very object of the Act is to avert insolvency.

[317] McDONALD, C.J.:—

The Windsor & Annapolis Railway Company was incorporated by a provisional Act passed on the 7th day of May, 1867, "for the purpose of constructing under the authority, powers and provisions of the said Act, and also of the Act cap. 70 of the Revised Statutes, as far as the same shall be applicable, and also the said contract, a railway from Windsor to Annapolis, for the conveyance and transportation of Her Majesty's, or her successors', mails and passengers, freight, and generally the transaction of all business connected therewith, or necessarily or usually performed on or by railways, and for constructing such wharves, docks, bridges or piers as may be necessary for the same." By section 7 of the same Act the Company was authorized . . . "to make such connection as they may think proper with other railway or steamboat companies within or without the Province, either by leasing their road to other corporation or corporations, on such terms and for such length of time as may be agreed upon, or by consolidating the stock of their road with that of other railway companies or company, upon such terms as may be agreed upon, to make, execute and deliver good and sufficient mortgage deed or deeds of their road and all its branches, to such private person or company within or without this Province, as they may think the interests of the stockholders require." By chapter 23 of the Local Acts of 1869, the Act of In-

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corporation of the "Windsor & Annapolis Railway Company" was amended by incorporating with that Act articles of association entered into on the 26th day of February, 1867, by and between the then shareholders of the company incorporated and registered in England as the "Windsor & Annapolis Railway Company, Limited," and enacting that "the Company may do such other acts as are authorized by the said articles of association." Among other provisions of the articles thus incorporated into the Act of 1867, was one authorizing the company "to acquire by purchase or otherwise, a concession or concessions for any branch, extension, or other railway or railways to be situate in the said Province, or any other Province or county adjacent or near thereto, . . . or [318] the purchasing, leasing, or working of any such branch, extension, or other railway from or under the government of Nova Scotia or any other government or private person or persons, etc." Under the powers conferred by the Act of 1867, the Windsor & Annapolis Railway Company constructed the railway from Windsor to Annapolis, as provided for in that Act, and have continued to operate the same since its completion. In 1874 the Legislature of Nova Scotia passed an Act, cap. 104, entitled "An Act to facilitate arrangements between railway companies and their creditors," and the meaning of the word company in the Act is declared to be "any railway company constituted by any Act of the Legislature of Nova Scotia." In accordance with the provisions of this Act, the Windsor & Annapolis Railway Company proposed a scheme of arrangement which was filed and confirmed by an order or rule of the Court on the 26th of January, A.D. 1875; and in September, A.D. 1882, Mr. Henry, on behalf of the company, proposed a further or amended scheme of arrangement, which he moved the Court to confirm, in terms of the Act. Some of my brethren en-

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tertaining doubts whether the Act of 1874 was within the competency of the Local Legislature to enact, Mr. Henry was directed to speak to that point, which he did, on the 20th of December last, and again on the 17th of March last, but the effect of the amending Act of 1869, if any, or the power of the Local Legislature since the union to confer upon the company the larger powers referred to in the articles of association set forth in the Act, were not discussed. It is admitted, I believe, that it was fully competent to the Legislature of Nova Scotia to pass the Act of 1867, and to confer upon the company all the powers and privileges specified in the Act; and the Windsor & Annapolis Railway Company has not, in terms of sect. 92 of the B. N. A. Act, been declared to be a work for the general advantage of Canada. It does not appear that the company have extended their operations beyond the Province of Nova Scotia, or that they have done, or are now doing more, than operating the road between Windsor and Annapolis under the terms of their charter.

The majority of the Court are of opinion that the rule to confirm this scheme, in terms of the Act, should pass.

[319] RIGBY, J.:—

At first I was doubtful whether this was a scheme that came within the Statute of 1874. I thought the Statute of 1874 was within the competency of the Local Legislature, but that it would not cover the scheme intended to provide for a composition between the railway and their creditors. After hearing Mr. Henry in relation to this matter, I was of opinion that it would come within that sub-sect. of the exclusive powers of the Provincial Legislature which related to property and civil rights in the Province, unless overborne by a provision in sect. 91 that gave the Dominion Parliament

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power over bankruptcy and insolvency. At first I was inclined to think it did so—that it was merely a scheme by which the Windsor & Annapolis Railway Company provided that their creditors should accept a less sum in payment of their liabilities than they were entitled to. But after Judge Thompson had drawn my attention to the real meaning of scheme, I changed my mind on that point and became convinced, so far as the documents contained the necessary information, that, instead of being an arrangement by which the creditors were compelled to take less than they were entitled to, it was merely changing the form of the stock and providing that stockholders should take one kind of stock in place of another. It did not appear that there was any liability to those stockholders for arrears of interest or any other liability that was being compromised by this scheme. Therefore, my present conclusion is that this is not a matter which comes within the exclusive competency of the Dominion Legislature, viz., bankruptcy and insolvency, but is a scheme within the Act of 1874, so far as that Act came within the competency of the Local Legislature. The Windsor & Annapolis Railway Company being a Provincial incorporation, and the property being within the Province, I consider the stock referred to in the scheme to be property over which the Provincial Legislature had exclusive jurisdiction.

WEATHERBE, J.:—

This is an application under cap. 104, 37 Vict., Acts of the Legislature of Nova Scotia, empowering a portion of the members of railway companies to make a scheme of arrangement between the company and their creditors to stay actions and other proceedings against the company, [320] and, I suppose, to reduce the claims of the creditors or extinguish them, or at any rate, delay payment. We are

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petitioned to make an order, provided by the Act to confirm a scheme of the Windsor & Annapolis Railway Company, incorporated under 30 Vict. cap. 36, amended by 32 Vict. cap. 23, of the Acts of the Nova Scotia Legislature, the first of which was passed previous to the B. N. A. Act, the other afterwards. The Windsor & Annapolis Railway Act of 1867, authorizes the company, in addition to the right to build a railway from Windsor to Annapolis, to make connections with other railway or steamboat companies, within or *without the Province*, and they may lease the road to other corporations, or consolidate their stock with other railway companies and convey their road by way of mortgage or other conveyance, to corporations within or without the Province. The power given to the company, under sect. 8 of the Act, to purchase or lease any line or lines of railroads, and to hold and use such railways and sell and sub-lease, or in any way convey the same, does not seem to be limited to this Province, but is given in general terms. This Act also incorporates a contract with the Nova Scotia Government, and secures to the company rights in a railway which belonged to the Province, and which has become the property of Canada by the B. N. A. Act. The company is incorporated under the Joint Stock Companies' Act of England, and by the Nova Scotia Act of 1869 amending the Act of 1867, the articles of association are incorporated and made part of the incorporation. The head office and the board are in London. All that is required is that a solicitor should be in this Province, upon whom service can be had. All or nearly all the shareholders and creditors are beyond the jurisdiction of this Court. I will assume that the proposed scheme may be of advantage to the present creditors and shareholders, but if we make an order upon which the improvement of the position of the present shareholders and creditors ensues upon

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the strength of the change, and they should sell or transfer their interests, unless our order should be valid, it might turn out disastrous to other persons hereafter.

As the proceeding is *ex parte*, the question is one of importance, and, as I am so unfortunate as to differ from [321] the rest of the Court, I, with diffidence, take occasion to state the reasons which prevent me from joining my brethren in making any order whatever, though I understand the order to be granted is not the one asked for. The scheme is based on an order already obtained by virtue of the Act under which the application is made. The scheme, as it stands, is one which recites the incorporation in England and deals with the creditors under that incorporation. I think we can get but little assistance from decided cases. In *The Citizens Insurance Company of Canada* v. *Parsons* (1), it was contended that the right to require specific conditions in all insurance contracts, whether entered into with a company incorporated within or without the Province, was not a provincial matter, but was a subject for exclusive Dominion legislative jurisdiction. It was held that this right to legislate fell within article 13 of sect. 92, "Property and civil rights in the Province," which words are to be taken in their largest sense. If this matter does not fall within the provisions of sect. 92 of that Act, the application fails. If it so falls the petition will still be refused, if there is anything in sect. 91 covering the matter so as to override the provisions of sect. 92. The only contention made by petitioner's counsel was that the matter was one of "property and civil rights," under article 13 of sect. 92. A majority of the Court were at first opposed to the application, and, after we had all given much attention to the matter, the petitioner was again heard. No doubt, in one sense, this is a question

(1) 7 App. Cas. 96; *ante* vol. 1, p. 265.

of property and civil rights, namely, the railway property of the company and their rights in the Government Railway. There are few questions of trade and commerce, navigation and shipping, banking, bills of exchange, and promissory notes and bankruptcy and insolvency, that do not involve also questions of property and civil rights, and yet they are clearly exclusively within the legislative powers of Canada so as to override the provisions as to property and civil rights. It must be admitted that, respecting all purely provincial railways, incorporated within the Province, in questions arising as to the property and civil rights of the shareholders, the matter would fall within article 13, because that relates to property and civil rights within the Province, subject, even then, to be overborne by sect. 91; but I doubt whether it [322] can be said that the property and rights of a railway authorized by an Act to extend beyond the Province or connect with other railway or steamboat lines without the Province, fall within sub-sect 13. That is not, I think, the true construction of sub-sect. 13. It was not attempted by counsel to bring this matter within article 10 (*a*) and, I think, even if the matter in question falls within article 13, the language of article 10 shews that this matter embraces an undertaking connecting the Province with another Province, or, at any rate, extending beyond the limits of the Province.

In *Dow* v. *Black* (1), a question arose respecting a railway company incorporated before confederation, the same year, I think, that the Windsor & Annapolis Railway Company was incorporated, with language very much like this, authorizing the company to make a railway to the frontier of the State of Maine and combine with other roads. The Privy Council would not determine whether this was an Act that could have been passed by

(1) L. R. 6 P. C. 272; *ante* vol. 1, p. 95.

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the Province after Confederation, but it seemed to have been admitted that no such Act could have passed connecting two Provinces. An Act of the Province, after Confederation, to tax a district of the Province to assist the road, was held to fall exclusively within article 2 of sect. 92, "Direct taxation within the Province." In *Bourgoin* v. *The Montreal, Ottawa & Occidental Railway Company* (1), a railway was declared under article 10 (*c*) of sect. 92, taken with sect. 91, of the B. N. A. Act to be for the benefit of Canada, and the transfer of that road to the Province was confirmed by an Act of the Province. It was held that that Provincial Act of Quebec was *ultra vires* in the case of an execution against the original owner, levied on the property, and that it required a Dominion Act to transfer or confirm the transfer of the railway property in question to the Province.

The undertaking is clearly on the face of it a joint stock share company formed in London, with the head office there, for construction of railways and tramways in the colonies, and for leasing the same, connecting with other railway or steamboat lines, home or foreign, to consolidate their stock with other companies, and to buy and sell railways or tramways and mortgage the same within or without the Province. It may be said they have, as [323] yet, only acquired property in the Province. That they have not disclosed. In *L'Union St. Jacques de Montreal* v. *Bélisle* (2), on the face of the impeached Act it is admitted that the plaintiff society was in a state of extreme financial embarrassment, and no doubt the Act was passed to relieve them from that position. Lord Selborne, in giving the judgment of the Privy Council, said the matter was one of a merely local or private nature *in the Province*, "because it relates to a benevolent

(1) 5 App. Cas. 381; *ante* vol. 1, p. 233.
(2) L. R. 6, P. C. 31; *ante*, vol. 1, p. 63.

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or benefit society, incorporated in the City of Montreal, which appears to consist exclusively of members who would be subject *prima facie* to the control of the Provincial Legislature," and the Act, he said dealt with the affairs of that particular society. "Clearly," he continues, "this matter is private; clearly it is local (so far as locality is to be considered), because it is in the Province and in the City of Montreal; and unless, therefore, the general effect of that head of sect. 92 is, for this purpose, qualified by something in sect. 91, it is a matter not only within the competency but within the exclusive competency of the Provincial Legislature." About that part of thi binding decision there is no difficulty. The difficulty arises as to the application of what is laid down about bankruptcy and insolvency. In that case the Act relieving the plaintiff from the extreme financial embarrassment was held not to fall within the subject of bankruptcy and insolvency, and the onus was said to be on the party disputing the validity of the Act, and that there was no indication of anything being contemplated in sect. 91, except general legislation, and also that bankruptcy and insolvency are defined to comprehend provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including the conditions in which that law is to be brought into operation. It is further said, (1) There is no such general law passed by the Dominion concerning the particular association. (2) The possibility of such a law is no reason why the power of the Province over this local and private association should be in abeyance or taken away. (3) Legislation dealing with the financial embarrassment of the society, and preventing its ruin, does not bring the matter within the category of insolvency. (4) The tendency of such legislation is to keep

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the society out of insolvency. (5) The Act does not [324] terminate the association. (6) It does not propose a final distribution of its assets on the footing of bankruptcy or insolvency. (7) It does not wind it up. (8) It contemplates its going on, and possibly recovering its prosperity.

The Judicial Committee of the Privy Council for these reasons, held that this was not an Act relating to bankruptcy and insolvency. These propositions should be applied to this Windsor & Annapolis Railway Company: (1) There is no Dominion law of insolvency covering this company. (2) The possibility of such a law is no reason for depriving this company of the benefit of this Act. (3) An Act dealing with the embarrassment of this company and preventing its ruin, does not fall within the category of insolvency. (4) The tendency and effect of applying this legislation is to keep the company out of insolvency. (5) The scheme does not terminate the association. (6) It does not propose a final distribution of its assets. (7) It does not wind it up. (8) It contemplates its going on and possibly recovering its prosperity.

If I could follow this mode of reasoning, or if I could see that this reasoning was necessary to decide the question in hand, or intended to operate beyond the question under discussion, I must admit that I should consider myself concluded by authority. As it is, I must certainly, not without much doubt in consequence of the language of the judgment just referred to, say that I think the decision there given was not intended, and would not be held to cover the case now in hand. On the contrary, I am led to think the subject matter of the Act in question falls within article 21 of sect. 91 of the B. N. A. Act. Holding these views, I could not make up my mind to state the conclusion at which I arrived, without giving the reasons.

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Thompson, J

THOMPSON J.:—

I concur with the majority of the Court. It is impossible to hold that the Act of 1874 was beyond the power of the Legislature of Nova Scotia, because it is susceptible of a limited construction, and, under that limited construction it can be made applicable to a set of cases which would fall within the limited construction. I regard the application to us as one in which it is sought to affect property and civil rights within this Province, [325] of certain stockholders of the Windsor & Annapolis Railway Company, and to affect no other rights whatever. The application seems to me to entirely avoid the subjects of bankruptcy and insolvency. The construction under which the rule can be passed entirely avoids the subject; it does not deal with the rights of any person or body of persons who stand in the relation of creditors of this company. The case from Quebec, cited from the Privy Council, and which is referred to by Judge Rigby, was a case in which, possibly, a great deal more difficulty might be met in removing it from the category of subjects relating to insolvency, because, there, the right of action and the contract itself were modified, and, in fact, the right of action taken away. With respect to these shareholders, they have no debt, no claim, no right of action, although the company is $70,000 in arrear to them. They have no right of action in this or any Court in any part of the world, in respect of it, so far as this company incorporated in Nova Scotia is concerned. They can simply apply for a receiver. Now, the scheme proposes that they give up that right and take other rights in lieu of it; therefore, it is not a question of bankruptcy or insolvency purely, but one of property and civil rights. We are able to give the rule in this case, notwithstanding the company professed to have larger powers than are usually conferred upon railway companies in the Province,

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because it was incorporated at the time when it was within the power of the Legislature to go beyond the Province. It then gave its constituent organization to the company, and the company stand in no different position from an individual in respect of property and civil rights. Foreign Courts will not at all be affected by any decision we come to.

I concur, to some extent, with Judge Weatherbe, as regards the difficulty if we had such a scheme before us as we had in the previous application. This does not, however, deal with creditors, or take away any right of action, nor does it put the company into insolvency. I do not know that it is necessary to express any opinion as to how far we could confirm the scheme previously before us, but as to the present scheme, I agree with the majority, notwithstanding that it is based to some extent on the former scheme. If the former scheme were not *res judicata,* then the order we now pass takes away no [326] right whatever, because it simply changes the right which arises if that former scheme is one which was valid and binding between the parties. If not valid and binding, then the parties to be affected by this rule have no rights whatever. With regard to the Dominion Parliament having legislated upon this company, I understand that the validity of the Acts was sustained in consequence of its being held that the Acts did not relate to this company at all.

NEW BRUNSWICK SUPREME COURT.

WARD v. REED.

1882*
November

(Reported 22 New Brunswick Reports, 279.)

Criminal law—Conflicting legislation.

By the Act 32 & 33 Vict. c. 31, s. 78 (D), it is provided that penalties against Justices of the Peace for the non-return of convictions may be recovered in an action of debt by any person suing for the same in any Court of Record :

Held, that this provision was within the competence of the Dominion Parliament, and that a Provincial enactment, declaring that County Courts should not have jurisdiction in such actions, was thereby overborne.

This was a prosecution against the defendant (respondent), a Justice of the Peace for the County of Westmoreland, to recover a penalty for not returning a conviction made by him, as directed by the Summary Convictions Act, 32 & 33 Vict., c. 31. The 76th sect. of that Act declares that "every Justice of the Peace shall make a return in writing under his hand, of all convictions made by him, to the next ensuing General or Quarter Sessions of the Peace, or to the next term or sitting of any Court having jurisdiction in appeal as hereinbefore provided, at which, in either case, the appeal can be heard, for the district or county or place in which such conviction takes place, in the following form :" etc. The 78th sect. declares that in case the Justice before whom any such conviction takes place, neglects or refuses to make such return, he [280] shall forfeit and pay the sum of $80, with costs of suit, to be recovered by any person suing for the same by

*Present :—ALLEN, C. J., and WELDON, WETMORE and PALMER, J.J.

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action of debt or information in any Court of Record in the Province in which such return ought to have been made—one moiety whereof shall be paid to the party suing, and the other moiety to the Receiver-General for the public uses of the Dominion.

The conviction, for the non-return of which this prosecution was brought, was made on the 10th March, 1879 under the 26th sect. of the Act 32 & 33 Vict., c. 22, for unlawfully and maliciously cutting and destroying trees and underwood in the Parish of Sackville and County of Westmoreland.

The 65th sect. of the Summary Convictions Act, as amended by 40 Vict., c. 27, declares that unless it is otherwise provided in any Act under which a conviction is made by a Justice of the Peace, or unless some other Court of Appeal having jurisdiction in the premises is provided by an Act of the Legislature of the Province within which such conviction is made, any person who thinks himself aggrieved by any such conviction, "may appeal in the Province of New Brunswick to the County Court of the district where the cause of the information or complaint arose." The action to recover the penalty for not returning the conviction in this case was brought in the Westmoreland County Court, and the plaintiff on the trial proved that the conviction had not been returned to the next County Court of that county after the conviction was made.

A non-suit was moved for on the following grounds :— 1. That the County Court had not jurisdiction by the Provincial Act to try actions against Justices of the Peace, and the Dominion Parliament had not power to give such jurisdiction. 2. That it was not proved that the conviction had not been returned to and filed in the office of the Clerk of the Peace of the County. 3. That if an action could be brought in the County Court the

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defendant was entitled to a notice of action by the Consol. Statutes, c. 90. The learned Judge of the County Court overruled the first ground for a non-suit; and the [281] plaintiff's attorney then obtained leave to amend the declaration by adding to the averment of the non-return of the conviction to the County Court, an averment that it had not been filed with the Clerk of the Peace; and he applied for a postponement of the trial, to enable him to prove that allegation; but this was refused, and the plaintiff was non-suited.

It was not distinctly stated in the return from the County Court whether the non-suit was granted solely on the ground of want of proof of not filing the conviction with the Clerk of the Peace.

The plaintiff appealed from the decision of the County Court Judge ordering a non-suit.

T. C. Allen for the appellant.

E. L. Wetmore, Q. C., for the respondent.

The judgment of the Court was delivered by

ALLEN, C. J.:—

[After stating the facts as above set forth, the learned Judge continued, p. 283.]

As to the first objection—I think there is no doubt about the power of the Dominion Parliament to authorize any Court in this Province to try such an action as this. It is a matter connected with the administration of the criminal law, which belongs exclusively to the Dominion Parliament, which has the right, in legislating upon a matter within its control to give authority to the existing Courts in the Province to try such matters. This principle was established in *Valin* v. *Langlois* (1),

(1) 3 Can. S. C. R. 1; *ante* vol. 1, p. 158.

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where the question arose as to the right of Parliament to impose on the Judges of the Superior Courts of the several Provinces in the Dominion, the duty of trying petitions respecting controverted elections of members of the House of Commons. Ritchie, C. J., in that case (p. 20), says, "whether then this Act (the Controverted Elections Act) is to be treated as declaring the Courts named Dominion Elections Courts, or whether it is to be treated as merely conferring on particular Courts already organized a new and peculiar jurisdiction, is a matter to my mind of no great importance, as I think while they have clearly the power of establishing a new Dominion Court, they have likewise the power, when legislating within their jurisdiction, to require the [284] established Courts of the respective Provinces and the Judges thereof . . . to enforce their legislation."

This Court has often acted on that principle, in prosecutions under the Canada Temperance Act, which by sect. 103 gives jurisdiction over prosecutions for violations of the Act in this Province to Police Magistrates and certain other officials.

I think the power given by the 78th sect. of the Summary Convictions Act, to sue for the penalty in any Court of Record in the Province, overrides the provisions in the local statute (Consol. Stat., of 1877, c. 51, s. 7) (1) that the County Courts shall not have jurisdiction over actions against Justices of the Peace.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question].

(1) [Con. Stat., c. 51, s. 7 (County Courts Act): "The Courts shall not have cognizance, . . 5th, of any action against a Justice of the Peace for anything done by him in the execution of his office."]

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PRIVY COUNCIL.

HER MAJESTY THE QUEEN ..... *Appellant;*

AND

BURAH ..... *Respondent.*

1878*
May 15;
June 5.

[*Reported 3 App. Cas. 889.*]

On Appeal from the High Court at Bengal.

Powers of Legislature—Indian Councils Act, 1861, s. 22—Indian High Courts Act, 1861—Conditional Legislation—Act 22, of 1869.

Act No. 22 of 1869, of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council.

The 9th sect. of that Act which confers upon the Lieutenant-Governor of Bengal, the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power.

Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.

Appeal from a judgment of a full Bench of the High Court (March 26th 1877).

*Present:—LORD SELBORNE, SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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The respondent Burah and one Book Singh, since deceased, were tried by the Deputy Commissioner of the Khasi and Jaintia Hills, in the East Indies, on a charge of murder of one Kana Lalung, committed near Yeothymmai, in the territory known and defined as the Jaintia and Khasi Hills, and sentenced to the punishment of death; but the sentence was afterwards, on the 23rd of April, 1876, commuted by the Chief Commissioner of Assam to transportation for life.

On the 9th of July, 1876, the officer in charge of the Kamroop Jail, where the said Burah and Book Singh were in confinement as prisoners under the said last mentioned sentence, forwarded to the High Court at [890] Calcutta, petitions of appeal from them, dated the 9th of July, 1876, against the sentence.

The High Court having doubts whether they had jurisdiction over the prisoners, referred the question of their power to entertain the petitions to a full Bench of the said Court. The question was argued before a full Bench on two occasions, and the majority of the High Court, on the 26th of March, 1877, decided that the said Court had such jurisdiction, and that the record of the case ought to be sent for in order to the admission of the appeal, and the said Court passed judgment, and ordered the same accordingly.

By Act 22 of 1869, of the Council of the Governor-General of India in Council for making laws and regulations, which is entitled "An Act to remove the Garo Hills from the jurisdiction of the tribunals established under the General Regulations and Acts, and for other purposes," it is, among other things, provided as follows:—

Sect. 2. "This Act shall come into operation on such day as the Lieutenant-Governor of Bengal shall, by notification in the *Calcutta Gazette*, direct.

Sect. 3. "On and after such day, Act No. VI. of 1835

(so far as it relates to the Khasi Hills, therein termed 'Cossyah' Hills), and the Bengal Regulation X. of 1822, shall be repealed: Provided that such appeal shall not affect any settlement of land, revenue, or other matters, made under the latter enactment with zemindars or other persons in any place to which this Act applies.

Sect. 4. "Save as hereinafter provided, the territory known as the Garo Hills, bounded on the North and West by the district of Gawalpara, on the South by the district of Mymensingh, as defined by the Revenue Survey, and on the East by the Khasi Hills, is hereby removed from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code, and the Acts passed by any Legislature now or heretofore established in British India, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid: And no Act hereafter passed by the Councils of the Governor-General for making laws and regulations shall be deemed to [891] extend to any part of the said territory, unless the same be specially named therein.

Sect. 5. "The administration of civil and criminal justice, and the superintendence of the settlement and realization of the public revenue, and of all matters relating to rent, within the said territory, are hereby vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance or of reference and appeal, from time to time appoint. The officers so appointed shall, in the matter of the administration and superintendence aforesaid, be subject to the directions and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue.

Sect. 8. "The said Lieutenant-Governor may from time

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to time, by notification in the *Calcutta Gazette*, extend to the said territory any law or any portion of any law, now in force in the other territories subject to his Government or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may, on making such extension, direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

Sect. 9, "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India. Every such notification shall specify the boundaries of the territories to which it applies."

Under the provisions of the said Act, No. XXII. of 1869, the Lieutenant-Governor of Bengal, on the 14th of October, 1871, issued a notification, which was published in the *Calcutta Gazette*, and thereby in exercise of the powers conferred upon him by sect. 9, he extended the provisions of the said Act to the territory known as the Khasi and Jaintia Hills, and excluded therefrom the jurisdiction of the Courts of Civil and Criminal Judicature, and specified in the notification the boundaries of [892] the said territory. The following is a copy of the notification :—

Notification.

"The 14th of October, 1871, under sect. 9 of Act XXII., of 1869, the Lieutenant-Governor is pleased to extend all the provisions of that Act to the district of the Khasi and Jaintia Hills, bounded as follows :—

"By the districts of Kamroop and Nowgong on the north;

"The districts of Nago Hills and Cachar on the east;

"The Garo Hills on the west;

"The districts of Sylhet and Cachar on the south;

"The chief political and revenue control of the aforesaid district, and the administration of civil and criminal justice are vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor.

"The Commissioner will exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the said district, provided that no sentence of death shall be carried out without the sanction of the Lieutenant-Governor, and that it shall be competent to the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him may seem fit.

"The Deputy Commissioner of the district and his assistants, the native chiefs and officers, and the subordinate officers of Government, will exercise the same powers as they have hitherto exercised, until otherwise directed. No case not now triable in the ordinary British Courts, shall, by this notification, be made triable therein. In respect of cases hitherto triable in those Courts, the officers shall be guided by the spirit of the laws prevailing in British India and heretofore in force in the district.

"(Signed) S. C. BAYLEY,
Officiating Secretary to the Government of Bengal."

The said High Court, for reasons assigned in separate judgments of Mr. Justice Markby and three other Judges, forming the majority of the said Court (Garth, C.J., Macpherson and Pontifex, JJ., dissenting), decided (March 26th, 1877) that the notification of the Lieutenant-Governor of Bengal had no legal force or effect [893]

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in removing the said territory from the jurisdiction which the High Court had previously possessed over it, inasmuch as the Council of the Governor-General of India in Council for making laws and regulations had under its constitution by the Councils Act, 1861, no power to delegate such authority to the Lieutenant-Governor as it had by the Act XXII. of 1869, in fact purported to delegate. Accordingly they decided that the High Court had jurisdiction to entertain the defence of the before mentioned prisoners, notwithstanding the provisions of Act XXII. of 1869. Thereafter, on the 10th of October, 1877, the petitions of appeal came on for hearing before a Division Bench of the High Court, and on such hearing was dismissed.

The Government of India, on behalf of the Crown, being dissatisfied with the judgment and order of the full Bench dated March 26th, 1877, a petition was presented to Her Majesty in Council by the officiating Advocate-General of Bengal, praying for special leave to appeal therefrom to Her Majesty in Council; and on the 11th of July, 1877, such special leave was granted.

By the statute 24 & 25 Vict. c. 67 (the Indian Councils Act, 1861), the power given to the Governor-General in Council, at meetings for the purpose of making laws and regulations, is conferred by the 22nd section, which is as follows:—

Sect. 22. "The Governor-General in Council shall have power, at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever, now in force or hereafter to be in force in the Indian territories, now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice

whatever, and for all places and things whatever, within the said territories, and for all servants of the Government of India within the dominions of princes and States in alliance with Her Majesty; and the laws and regulations so to be made by the Governor-General in Council, shall control and supersede any laws and regulations in anywise repugnant thereto, which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay, respectively, in Council, or [894] the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a Council may be appointed, with power to make laws and regulations, under and by virtue of this Act: provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act;

Or any of the provisions of the Acts of the 3rd and 4th years of King William the Fourth, chapter 85, and of the 16th and 17th years of Her Majesty, chapter 95, and of the 17th and 18th years of Her Majesty, chapter 77, which, after the passing of this Act, shall remain in force: Or any provisions of the Act of the 21st and 22nd years of Her Majesty, chapter 106, entitled "An Act for the better government of India," or of the Act of the 22nd and 23rd years of Her Majesty, chapter 41, to amend the same;

Or of any Act, enabling the Secretary of State in Council, to raise money in the United Kingdom for the Government of India;

Or of the Acts for punishing mutiny and desertion in Her Majesty's Army, or in Her Majesty's Indian Forces respectively, but subject to the provisions contained in the Act of the 3rd and 4th years of King William the Fourth, chapter 85, section 73, respecting the Indian Articles of War;

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Or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian Territories, or the inhabitants thereof;

Or which may affect the authority of Parliament, or the Constitution and rights of the East India Company, or any part of the unwritten laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said Territories."

Sir James Stephen, Q.C., and *Mr. Graham*, for the Appellant, said that the main question was whether sect. 9 of Act XXII, of 1869, was within the legislative [895] capacity of the Council; for, assuming the validity of that section, no objection had been raised to the notification. The three questions raised by the judgments of the Court below were, first, whether the Legislature had the power to remove the district in question from the jurisdiction of the High Court; second, whether it had the power to do so in the manner prescribed by Act XXII, of 1869, sect. 9; third, whether it is *ultra vires* of the High Court to question the validity of an Indian Legislative Act.

As respects the first of these questions, it was pointed out that all the Judges were in favour of the existence of such legislative authority; and as regards the third question, they disclaimed that contention, and conceded that the High Court had such power.

With regard to the existence of such legislative authority, reference was made to 3 & 4 Will. 4, c. 85, s. 43; 24 & 25 Vict. c. 67, s. 22; 24 & 25 Vict. c. 104, ss. 9, 11, 13; and to *The Queen* v. *Meares* (1). By sects. 9, 11,

(1) 14 R. & R. 106.

and 13 of c. 104, it was intended to preserve to the Governor-General in Council certain legislative powers, which otherwise, by reason of the provision in sect. 22 of c. 67, the Governor-General in Council would not have had. The matters covered by those sections are matters relating to the High Court, in respect of which, the Governor-General in Council was intended to have legislative powers. See, too, *The Queen* v. *Reay* (1). Act XXII, of 1870, gave validity retrospectively to all the Provincial Acts which were open to the objections there taken. It asserts the power of the Governor-General in Council to interfere with the Charters of the High Court. Reference was also made to 34 & 35 Vict c. 35, s. 3, reciting Act XXII, of 1870, of the Governor-General's Council; Feda Hossein's Petition (2). See also High Courts Act, *i.e.* c. 104, s. 17, which prolongs the power of issuing letters patent for three years, and clause 44 of the Letters Patent of 1865.

The next question was, whether the Legislature had power to affect the jurisdiction of the High Court by the mode provided in sect. 9 of Act XXII, of 1869. The powers of the Indian Legislature are as great as [896] those of the Canadian, and see 30 & 31 Vict. c. 3 (Canada), s. 91, which establishes the Parliament of Canada. Compare 3 & 4 Will. 4, c. 85, s. 45. (Lord Selborne :—Is it contended that the Legislature may not render its enactment dependent for its coming into operation on the act of the executive ?) That is the main contention on the other side. The powers given to the Lieutenant-Governor are within the limits of the legislative authority to confer, see Act XXII, of 1869, sects. 5 and 8. For instances of conferred discretion, see Act XI, of 1857 ; Act XVI, of 1857; Act XXIII, of 1861, sect. 39; Act VIII, of 1859, sect. 385 ; Act XIV, of 1859, sect. 24. The Legislature

(1) 7 Bomb. H. C. R. Cr. Ca. 77.

(2) Ind. L. R. 1 Calc. 431.

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frequently delegates authority to say when the Act is to come into force, within what limits it is to be applied, and to make rules and orders. For instances of delegation of authority by Parliament to the Governor-General, see 22 & 23 Vict. c. 27; 28 Vict. c. 15, sects. 3 and 5; 28 Vict. c. 18; 33 Vict. c. 3; 24 & 25 Vict. c. 67, sects. 44, 46 and 47. It would be a serious thing to interfere with the exercise of such delegated authority, as being *ultra vires* the legislative authority to confer. It has been frequently exercised in the colonies as well as in India, see Act III, of 1865 (Cape of Good Hope), sect. 12.

Mr. J. B. Norton and *Mr. Raikes* (*Mr. Eardly Norton* with them), for the Respondent, said that the Judges of the High Court seemed to have been unanimously of opinion that the Indian Legislature could legally remove districts from the jurisdiction of the High Court, and also that it was open to the High Court to try the validity of a law made by the Indian Legislature. The real question upon which difference of opinion existed was, whether the Indian Legislature, by the particular means it had adopted in this case, effectually and legally carried out the object it had in view. They contended that the jurisdiction of the High Court as established by Parliament, could not be wholly abolished by any authority in India.

Reference was made to the Indian Councils' Acts, 24 & 25 Vict. c. 67, sect. 22. It was never intended to grant such power as is now claimed. According to the true construction of the above section it is not granted, but it is by necessary implication excluded. Compare that [897] section with 3 & 4 Will. 4, c. 85, s. 43. There is a significant and intentional omission in sect. 22, which in other respects is *totidem verbis*. Under sect. 43 of the former Act, the Governor-General could legislate for all Courts

whether by charter or otherwise, and for their jurisdiction. In 1861 the High Courts Act, 24 & 25 Vict. c. 104, and the Councils' Act, c. 67, were passed within six days of each other to carry out one and the same scheme.

Jurisdiction was provided for under c. 104, and power to legislate in reference to the High Court was expressly reserved to Parliament by sects. 9, 11 and 13 of c. 104. No argument, therefore, can be drawn from c. 67, in favour of such legislative authority residing in the Indian Legislative Councils under that Act. Sect. 18 deals with territorial jurisdiction, and that is repealed by 28 & 29 Vict. c. 15, s. 2.

Next, assuming that the Indian Legislature has the power which is claimed for it, it has not adopted the proper method. If the jurisdiction of the High Court can be abolished by that Legislature, it must be by an Act passed by the Governor-General in Council, in conformity with the powers conferred on him in that respect by the Imperial Parliament. No such Act could delegate any legislative authority or power enabling the Lieutenant-Governor of Bengal, if he so pleased, to abolish the jurisdiction of the High Court. No such power of delegation was given, either expressly or by necessary implication, from the terms of the Indian Councils' Act. The notification of the 14th of October, 1871, was a nullity and of no legal effect. Reference was made to *Doyle* v. *Falconer* (1); and for American authorities to *Barto* v. *Himrod* (2); *Parker* v. *Commonwealth* (3); *Thorne* v. *Cramer* (4); *Bradley* v. *Baxter* (5).

Parliament has constituted the legal machinery for making laws, nominating qualified persons, and regulating the method, time, and place, by and in which Acts are to

(1) Law Rep. 1 P. C. 328.
(2) 4 Seldon, (N. York Rep.) 483.
(3) 6 Barr. (Penn. Rep.) 507.
(4) 15 Barb. (N. York Rep.) 112.
(5) 15 Barb. 122.

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be passed, and has jealously guarded the degree in which any departure from their provisions may be effected, whenever such departure is permitted. Reference was made to 3 & 4 Will. 4, c. 85, s. 43, repealed by 24 & 25 Vict. c. 67, s. 40; Ibid. s. 70; 16 & 17 Vict. c. 95, [898] s. 22; 17 & 18 Vict. c. 77, s. 3; 24 & 25 Vict. c. 67, ss. 10, 14, 21, 22, 23, 25; 33 Vict. c. 3.

Lastly, it was contended that the question of the legislative capacity of the Governor-General's Council to affect the jurisdiction of the High Court did not arise in this case, inasmuch as by the true construction of Act XXII. of 1869, the jurisdiction of that Court as to the Garo Hills was not excluded. The Council had not assumed to exercise the legislative authority contended for and still less to delegate its exercise in reference to the Khasi and Jaintia Hills. The nature of this contention sufficiently appears in their Lordships' judgment.

Sir James Stephen, Q.C., replied.

The judgment of their Lordships' was delivered by

LORD SELBORNE:—

This appeal has been brought under the following circumstances:—

In the year 1869, the Indian Legislature passed an Act (No. XXII. of 1869), purporting first, to remove a district called the Garo Hills from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue, constituted by the regulations of the Bengal Code and the Acts passed by any Legislature then or theretofore established in British India, and from the Law prescribed for such Courts and offices by such Regulations and Acts; and, secondly, to vest the administration of civil and criminal justice, within the same territory, in such officers as the Lieutenant-Governor of

Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of Bengal should, by notification in the *Calcutta Gazette*, direct. By the 9th sect. the Lieutenant-Governor was empowered "from time to time by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the Jaintia Hills, the Naga Hills, and such portion of the Khasi Hills as might, for the time being, form part of British India," being, [899] as their Lordships understand, a mountainous district, conterminous towards the east with the Garo Hills.

The Lieutenant-Governor of Bengal, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the Garo Hills; and afterwards, by another notification published in the *Calcutta Gazette* on the 14th of October, 1871, he extended all its provisions to the district of the Khasi and Jaintia Hills, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district, provided that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the District, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

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Under this Act, and these notifications, one Burah (the Respondent here) and another person, since deceased, were, in the year 1876, tried by the Deputy Commissioner of the Khasi and Jaintia Hills, upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd of April, 1876, the sentence was commuted by the Chief Commissioner of Assam to transportation for life. On the 9th of July, 1876, they presented a petition of appeal to the High Court at Calcutta, and a majority of the Judges of that Court (four against three) decided, after argument in full Bench, that the case fell within their appellate jurisdiction, and they sent for the record of the proceedings with a view of an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorise the Lieutenant-Governor of Bengal to extend the Act of 1869, to the Khasi [900] and Jaintia Hills, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz.:—(1), that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the Garo Hills, and, therefore could not do so as to the Khasi and Jaintia Hills, assuming them to have been brought within its operation; and (2), that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not sect. 9 only, was void, and *ultra vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at Calcutta, but the former was not presented to

that Court, and was first suggested at the hearing before their Lordships, by the junior counsel for the Respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition that the 4th section of Act XXII, of 1869, purports to remove the Garo Hills, not from the jurisdiction of the High Court established by Her Majesty's letters patent, under the authority of Imperial Statutes, but only from that of the local Courts, constituted by the regulations of the Bengal, or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of Bengal) substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature," mentioned in the 4th section of the Act of 1869, were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow.

It may be possible that under the terms of the 8th and 9th sections of the High Courts Act (24 & 25 Vict. c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December, 1865), under which the Calcutta High Court is constituted, appeals might have gone to that Court from criminal tribunals of first instance, established by the Lieutenant-Governor of Bengal in the Garo, or the Khasi and Jaintia Hills, if Act XXII, of [901] 1869, had made no other provision for such appeals. But the 5th section of that Act distinctly authorised the Lieutenant-Governor to appoint tribunals, not of first instance only, but also of "Reference and Appeal"; and by the notification now in question he has done so, giving the power of the High Court to the Commissioner of Assam, with an ultimate controlling authority to himself.

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Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void. It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 & 25 Vict. c. 104), which passed in the same session with the Indian Councils' Act; and because, by sect. 22 of the Indian Councils' Act (24 & 25 Vict. c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever, now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories," is qualified by certain conditions, one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal, or in any way affect, any of the provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian Territories or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case. The question, therefore, is whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 & 25 Vict. c. 104.

Now it appears to their Lordships, from the express terms of the Act 24 & 25 Vict. c. 104, that (unless there should be anything to the contrary in the letters patent

under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian [902] territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to all Courts of Justice whatever.

By the 1st sect. of that Act, Her Majesty was authorised, by letters patent, "to erect and establish a High Court of Judicature for the Bengal division of the Presidency of Fort William," and others at Madras and Bombay. The next six sections relate to the qualifications, tenure of office, and emoluments, etc., of the judges of such Courts. The 8th sect. abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th and 12th sects. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 & 29 Vict. c. 15). But, as some argument was founded on the 18th, it may be fit here to observe that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts"; and that the same power was, in substance, conferred upon the Governor-General of India in Council (not in his legislative, but in his executive capacity) by the repealing Act of 1865.

The 9th sect. of 24 & 25 Vict. c. 104, expressly says that each of the High Courts shall, within its own presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her letters patent, grant and direct"; and that, "save as by such letters patent may be otherwise directed, and subject and without pre-

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judice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," the High Court in each presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by sect. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far at all events as the exercise of that authority might be consistent with Her Majestys letters patent) is here distinctly recognised.

The 11th sect. is similar in effect. It enacts that, after the establishment of the High Courts, every provision [903] in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of India, which had been applicable to the Supreme Courts of Bengal, Madras, and Bombay, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the letters patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council." The 12th sect. contains nothing of importance to the present question.

The Act of 1865 (under which the Calcutta letters patent of the 28th of December, 1865, were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the letters patent of the 28th of December, 1865 (clause 44), it is "ordained and declared that all the provisions of these our letters patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations." So far, therefore, from being in contravention of any of the provisions of the statute 24 & 25 Vict. c. 104, or of the letters patent issued under that statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the

Governor-General in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorized, both by those statutes and by the letters patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council, and they are, therefore, brought to the consideration of the more limited question, whether consistently with that view, the 9th sect. of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was that the 9th sect. was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice Markby, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, [904] in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges, between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th section. If by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to

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which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted, to enlarge the area within which a law actually in operation is to be applied, it would seem à fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, [905] they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in

India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils' Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the Garo Hills, what was done as to the Khasi and Jaintia Hills? The Legislature decided that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought [906] under the same provisions with the Garo Hills, not necessarily and at all events, but if, and when the Lieutenant-

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Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (xxii. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers, which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who

agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts viii. of 1859, xxiii. of 1861, and xxv. of 1861.)

By sect. 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories not subject to the general regulations of [907] Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the *Gazette*." Sect. 445 in the Code of Criminal Procedure is precisely similar. And by sect. 39 of Act xxiii. of 1861, when any such extension as that authorized by sect. 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India, great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir Richard Garth well observed) be presumed to have been known to, and in the view of the Imperial Parliament, when the Councils' Act of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

PRIVY COUNCIL.

1885*
Feb. 12, 13.

POWELL ..... *Defendant;*

AND

APOLLO CANDLE COMPANY, LIMITED .... *Plaintiff.*

On Appeal from the Supreme Court of New South Wales.

[*Reported 10 App. Cas. 282.*]

Law of New South Wales—Powers of its Legislature—Customs Regulation Act of 1879, s. 133—Duties levied under an Order in Council.

A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted.

Held, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (scheduled to 18 & 19 Vict. c. 54), ss. 1 and 45.

Held, further, that duties levied by an Order in Council, issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also, that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor.

Appeal from an order of the Supreme Court (February 21st, 1884) directing judgment to be entered for the respondent on his demurrer to the appellant's first plea, and also on the appellant's demurrer to the respondent's third replication.

The action was brought to recover back from the appellant, as collector of customs for the colony, the sum

*Present:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

of £92 1s. 6d., which the appellant had demanded as duty leviable by law on fifteen casks of stearine imported by the respondent, which sum the respondent thereupon deposited in the hands of the appellant as collector.

The appellant pleaded: First, a justification under the 133rd sect. of the New South Wales Customs Regulation Act, 1879 (42 Vict. No. 19), on the ground that stearine was an article of merchandise then unknown to the collector; that that article, in the opinion of the collector, was apparently a substitute for a known dutiable article, that is to say, candles; that it was apparently designed [283] to evade duty, and possessed properties in fact which could be used and were intended to be applied for a similar purpose as candles; and that thereupon the Governor with the advice of the Executive Council had directed that a duty of one penny per pound weight should thenceforth be levied on stearine on its importation into the colony.

The respondent replied: first, joining issue on the plea, and thirdly, that stearine did not in fact possess properties in whole or in part which could be used, or were intended to be applied, for a similar purpose as candles. The respondent also demurred to the plea.

The appellant demurred to the third replication.

The main question on this appeal was, whether the Customs Regulation Act, 1879 (42 Vict. No. 19), s. 133, was invalid, on the ground that the Colonial Legislature in passing that section had exceeded the powers conferred upon it by the 45th section of the bill passed by the Legislative Council of New South Wales, and Scheduled as amended to 18 & 19 Vict. c. 54, intituled "An Act to enable Her Majesty to assent to a bill, as amended, of the Legislature of New South Wales, to confer a constitution on New South Wales, and to grant a civil list to Her Majesty." The bill so amended is known in New South Wales as the Constitution Act.

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The respondent contended, and the Supreme Court (Martin, C. J., Windeyer and Innes, JJ.) decided, that the 133rd section of the Customs Regulation Act, 1879, was invalid, on the ground above mentioned.

The case is reported in 4 N. S. Wales L. R. p. 167.

The material portion of the judgment of the Chief Justice was as follows:—

Referring to sects. 1, 44 and 45 of the Constitution Act, he said: "These are the powers which the Imperial Parliament has granted to the Legislature of this Colony, very comprehensive powers to make laws for the good government of the Colony in all cases whatsoever, and special powers to impose duties. Now, this Legislature possesses only delegated powers, it is not like the Imperial Parliament which acknowledges no superior authority. There is no Legislature within the wide bounds of the [284] British Empire which is not in subordination to, and under the control of, that Imperial Parliament, and which does not derive its jurisdiction from that source. I am not speaking of Crown Colonies, to which other considerations apply. It follows that every such subordinate Legislature, of which ours is one, in the exercise of its power to make laws is limited by the authority which created it. That authority, when creating this Legislature, gave it the power to make these general laws, and also to impose these taxes, but it did not authorize it to delegate that power to any other body.

"What is it that sect. 133 of the Customs Act professes to do? It is in these terms, omitting immaterial parts:— 'Whenever any article possesses, in the opinion of the collector, properties in the whole, or in part, which can be used for a similar purpose as a dutiable article, the Governor is authorized to levy a duty upon such article at a rate to be fixed in proportion to the degree in which such unkown article approximates in its qualities or uses

to such dutiable article'. The Governor having been told by the collector that, some article unknown to him, possesses properties, which can be used, or were intended to be applied for a similar purpose, as a dutiable article is empowered to direct a duty to be levied on that article. He is to ascertain how far this unknown article in its qualities or uses approximates to such dutiable article. Having ascertained the degree of approximation, he then is to fix the duty in proportion thereto. Now it is easily ascertainable whether a commodity is unknown to the collector, but what is meant by 'the degree in which such unknown article approximates in its qualities to such dutiable article?' There is an amount of vagueness and obscurity here, which it is impossible to clear up, and yet this is the criterion by which the Governor is to fix the duty on this unknown commodity. It is conceivable that a pound of it might possess properties which could be used in the making of ten pounds of candles, or one pound of it might make only half a pound of candles, and so the duty fixed by the Governor may be more or less than the rate of duty imposed by the Legislature upon candles. But whatever it may be, on being published in a Treasury order, in the *Gazette* and one other newspaper in Sydney, and exhibited in the long room in [285] the Custom House, it may be demanded on the importation of the unknown article so practically legislated for by the collector and the Governor. Now that appears to me plainly to give the Governor and the collector power to impose duties on articles which the Legislature never had in its contemplation. When the collector says that any article is unknown to him, and that some of its properties can be used in the production of a dutiable article, such as candles, and the Governor in Council ascertains how much it would be necessary to use in the making of a pound of candles, he then fixes the amount of

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duty to be paid on it; having ascertained this, the new article is thereupon saddled with a duty. That is neither more or less than the Legislature delegating the power to impose taxes. The Imperial Parliament may so delegate, but it has not given the same power to our Legislature. To make this legislation legal there should have been express power given by the Imperial Parliament, not only to impose taxes on the people of this Colony, but also to confer on others the power to levy duties. It appears to me, without going into the other points, that under these circumstances the imposition of the duty on stearine was erroneous, and on that ground the demurrer should be sustained."

Davey, Q.C., and *J. D. Wood* (*Rigby*, Q.C., with them) contended that this decision was wrong. The Legislature of New South Wales had plenary powers of legislation within the prescribed limits of its jurisdiction. It had by the 1st section full power to impose and levy custom duties, except in so far as that power was limited by the 44th and 45th sections, which were not enabling but restrictive. There was nothing, however, in those sections which restrained the Colonial Legislature from imposing and levying duties as provided by sect. 133 of the Customs Regulation Act, 1879. And a duty levied by direction of the Governor in manner provided by the section is in reality a duty levied by the Legislature within the meaning of sect. 45. The Legislature of the Colony does not act as a delegate of Parliament. It has plenary powers so far as they go, and it entrusts the Governor with certain discretion, which it can revoke at any moment, not with any legislative power. Reference was made to *Reg.* v. *Burah* [286] (1); *Hodge* v. *The Queen* (2); *Russell* v. *The Queen* (3).

(1) 3 App. Cas. 889; *ante* p. 409. (2) 9 App. Cas. 117; *ante* p. 144.
(3) 7 App. Cas. 829; *ante* vol. 2, p. 12.

Cohen, Q.C., and *Kemp*, Q.C., contended that the judgment was right. By the true construction of the Constitution Act the Legislature of New South Wales had no power to delegate its authority to impose and levy duties to the Governor in Council, and therefore sect. 133 relied upon is invalid and inoperative. The duty in this case was in substance a duty prescribed by the Governor in Council and not by the Legislature. The Customs Act did not authorize a duty upon raw material, such as stearine, at the same rate or to the same extent as on candles.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The main question in this case is, whether sect. 133 of the Customs Regulation Act of 1879 of the Colony is, or is not, *ultra vires* of the Colonial Legislature. The section is in these terms:—"Whenever any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article; and such rate thus fixed shall be published in a Treasury order in the *Gazette* and one other newspaper published in Sydney, and exhibited in the long room or other public place in the Custom House, and a copy of all such Treasury orders shall, without unnecessary delay, be laid before both Houses of Parliament."

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The manner in which this question came before the Courts is this:—In pursuance of this section an Order [287] in Council was issued imposing a duty on the importation of stearine, the order following the words of the Act; whereupon the collector of customs insisted on a certain duty of a penny per pound, amounting to £92 1s. 9d., being paid on the importation of some 1500 barrels of stearine. The plaintiffs paid that sum under protest, and, in pursuance of sect. 20 of the same Act, brought an action for the purpose of recovering it. The collector defended himself by a plea to this effect:—He recites that stearine is an article of merchandise, using the descriptive words in the Act which have been read; and goes on to say that "thereupon the Governor, with the advice of the Executive Council, duly and in accordance with the provisions of the said Act, directed that a duty of one penny per pound weight should thenceforth be levied on stearine;" and "the said rate so fixed was duly published in a Treasury order," and so on. There was a demurrer to this plea, on the ground that the 133rd section of the Customs Consolidation Act was beyond the competence of the Legislature to enact. This demurrer raises the main question. There is a subsidiary question on the pleadings which will be referred to hereafter.

The powers of the Colonial Legislature depend upon a Colonial Act, known as "The Constitution Act," to which Her Majesty assented by virtue of powers given to her by an Imperial Statute, the 18 & 19 Vict. c. 54, to which the Colonial Act was a schedule. It may be as well to observe that the 4th section of the Imperial Act is in these terms:—"It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved bill in the same manner as any other laws for the good govern-

ment of the said Colony, subject, however, to the conditions imposed by the said reserved bill on the alteration of the provisions thereof in certain particulars, until and unless the said conditions shall be repealed or altered by the authority of the said Legislature,"—a somewhat wide power.

The material sections in this Constitution Act are the following:—Sect. 1. "There shall be, in place of the Legislative Council now subsisting, one Legislative Council and one Legislative Assembly, to be severally consti- [288] tuted and composed in the manner hereinafter prescribed; and within the said Colony of New South Wales Her Majesty shall have power, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, welfare and good government of the said Colony in all cases whatsoever." There follows a proviso, "that all bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost, subject always to the limitation contained in clause 62 of this Act," which clause is not to be found and may be disregarded, "shall originate in the Legislative Assembly of the said Colony." Sect. 44 prohibits the Legislature of the Colony from levying duty upon articles imported *bonâ fide* for the supply of Her Majesty's land forces, or enforcing any duties or charges upon shipping at variance with any treaty of Her Majesty. Sect. 45 is in these terms: "Subject to the provisions of this Act, and, notwithstanding any Act or Acts of the Imperial Parliament now in force to the contrary, it shall be lawful for the Legislature of the Colony to impose and levy such duties of customs as to them may seem fit, on the importation into the Colony of any goods, wares and merchandise whatsoever, whether the produce of or exported from the United Kingdom, or any of the colonies or dependencies of the United Kingdom." And there follows a prohibition to impose differential duties.

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It was held by the Supreme Court in the Colony that, under the terms of the Constitution Act the Legislature had not the power to enact the clause in question. And the argument before us has been based on very much the same grounds as the judgment, namely, that the Colonial Legislature had defined and limited powers which they could not exceed; that the power given to them to impose duties was to be executed by themselves only, and could not be intrusted by them wholly or in part to the Governor or any other person or body. It was further argued that the proviso in the 1st section that all money bills should originate in the Legislative Assembly of the Colony, was an indication that the Imperial Legislature assumed that all legislation in the Colony with respect to taxation should be by bill passed through both Houses.

Two cases have come before this Board in which the [289] powers of the Colonial Legislatures have been a good deal considered, but these cases are of too late a date to have been known to the Supreme Court when their judgment was delivered. The first was the case of *Reg. v. Burah* (1), in which the question was whether a section of an Indian Act conferring upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, should be applied to a certain district, was or was not *ultra vires*. In the judgment of this Board, given by the Lord Chancellor, the legislation is declared to be *intra vires*, and the Lord Chancellor lays down the general law in these terms:—"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary

(1) 3 App. Cas. 889; *ante* p. 409.

powers of legislation as large, and of the same nature, as those of Parliament itself."

The same doctrine has been laid down in a later case of *Hodge* v. *The Queen* (1), where the question arose whether the Legislature of Ontario had or had not the power of intrusting to a local authority—a Board of Commissioners—the power of enacting regulations with respect to their Liquor License Act of 1877, of creating offences for the breach of those regulations and annexing penalties thereto. Their Lordships held that they had that power. It was argued then, as it has been argued to-day, that the Local Legislature is in the nature of an agent or delegate, and, on the principle, delegatus non potest delegare, the Local Legislature must exercise all its functions itself, and can delegate or intrust none of them to other persons or parties. But the judgment, after reciting that such had been the contention, goes on to say, "It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assem- [290] bly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by sect. 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the Local Legislature is supreme, and has the same authority as the Imperial Parliament."

(1) 9 App. Cas. 117; *ante* p. 144.

These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate.

Applying these principles to the present case, it appears to their Lordships that the general terms of the 1st section of the Constitution Act, giving power to make laws "for the peace, welfare and good government of the Colony in all cases whatsoever," and sect. 45, to the effect that it shall be lawful for the Legislature of New South Wales to impose and levy such duties and customs as to them may seem fit, confer plenary powers of legislation comprising within their scope the section of the Customs Consolidation Act now in question. Those sections are subject to some limitations in sects. 44 and 45, which admittedly do not apply to the present case. But it has been argued that the proviso in sect. 1, that all bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost, shall originate in the Legislative Assembly in the Colony, is at the least a direction on the part of the Imperial Parliament, that all levying of taxes in the Colony shall be by bill originating, as in this country, in the Lower House. It may be that the Legislature assumed that, with respect to customs duties, such a course would be pursued as undoubtedly is in accordance with the usages and traditions of this country; but it appears to their Lordships impossible to hold that the words of an Act, which do no more than prescribe the mode of procedure with respect to certain bills, should have the effect of limiting the operation of those bills. The Customs Act, containing the clause now in question, [291] may be presumed to have been introduced in the Lower House according to the directions of the Statute.

But if without the proviso it would be competent to insert this clause in the bill, it is difficult to see how the proviso, which merely requires that the bill shall be introduced in one house and not in the other, can have the effect of making the clause *ultra vires*. It appears to their Lordships to have no such effect.

It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring sect. 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature.

The only question remaining arises also upon the pleadings. The plaintiffs demurred to the plea of the Collector, among other things, on this ground—that it stated merely the opinion of the Collector, and not the fact that the stearine was a substitute for a dutiable article, and so on; and they raised the same question further in the third replication, which is in these terms: "The article of merchandise known as stearine did not in fact possess properties, in whole or in part, which could be used, or were intended to be applied for a similar purpose as a certain known dutiable article known as candles." The effect of this replication is to raise the question whether, under sect. 133, the opinion of the Collector is the condition precedent of the action of the Governor, or whether the fact is such a condition precedent. The words are: "Whenever any article of merchandise then unknown to the Collector is imported, which, in the

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opinion of the Collector, or of the Commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used, or were intended to be applied, for a similar purpose as such dutiable article." It seems to their Lordships that the [292] words, "in the opinion of the Collector," govern the whole of this clause, and that if the Collector is of opinion that the "article is apparently a substitute for any known dutiable article, or is apparently designed to evade duty," and is of opinion further that it "possesses properties," etc., this opinion, whether right or wrong, authorizes the action of the Governor. The replication, therefore, admitting the opinion of the Collector, but alleging the fact to be at variance with it, is bad, and the plea is not bad for averring only the opinion and not the fact.

With respect to an argument which has been raised to the effect that the latter part of the section, directing "that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities to such dutiable article," does not apply if the allegation in the third replication be treated as admitted—as it must be on demurrer—it appears to their Lordships enough to say that this point does not appear to be raised by the replication.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, that judgment on the demurrers be entered for the defendant, and that the defendant have the cost of the demurrers in the Supreme Court. He will also have the costs of this appeal.

APPENDIX II.*

IMP. ACT 14 GEO. III., CAP. 83—1774.

THE "QUEBEC ACT."

AN ACT FOR MAKING MORE EFFECTUAL PROVISION FOR THE GOVERNMENT OF THE PROVINCE OF QUEBEC IN NORTH AMERICA.

Preamble.

Whereas His Majesty, by his Royal Proclamation, (1) bearing date the seventh day of October, in the third year of his reign, thought fit to declare the provisions which had been made in respect to certain countries, territories, and islands in America, ceded to His Majesty by the definitive treaty of peace concluded at Paris on the tenth day of February, 1773: and whereas, by the arrangements made by the said Royal Proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty, was left without any provision being made for the administration of civil Government therein; and certain parts of the territory of Canada, where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said Province of Canada, under grants and concessions from the Government thereof, were annexed to the Government of Newfoundland, and thereby subjected to regulations inconsistent with the nature of such fisheries:

May it therefore please your most Excellent Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and

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*As the old Constitutions of the Provinces included in the Dominion of Canada are occasionally referred to in the discussions arising on the B. N. A. Act, it has been thought useful to collect and print them in this Appendix.

(1) See note (1) p. 447, *post*.

consent of the Lords, Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same:

The territories, islands, and countries in North America, belonging to Great Britain.

That all the territories, islands, and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs, along the High Lands which divide the rivers that empty themselves into the River Saint Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude, on the eastern bank of the River Connecticut, keeping the same latitude directly west, through the Lake Champlain, until, in the same latitude, it meets the River Saint Lawrence; from thence up the eastern bank of the said river to the Lake Ontario; thence through the Lake Ontario, and the river commonly called Niagara; and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank, until the same shall be intersected by the northern boundary granted by the charter of the Province of Pennsylvania, in case the same shall be so intersected; and from thence along the said northern and western boundaries of the said Province, until the said western boundary strike the Ohio;

But in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at that point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania, and thence by a right line, to the said north-western angle of the said Province and thence along the western boundary of the said Province, until it strike the River Ohio; and along the bank of the said river, westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England, trading to Hudson's Bay; and also all such territories, islands, and countries which have, since the tenth of February, 1763, been made part of the Government of Newfoundland, be, and they are hereby, during His Majesty's pleasure, annexed to, and made part and parcel of the Province of Quebec, as created and established by the said Royal Proclamation of the seventh of October, 1763.

Annexed to the Province of Quebec.

Not to affect the boundaries of any other colony;

2. Provided always, that nothing herein contained, relative to the boundary of the Province of Quebec, shall in anywise affect the boundaries of any other colony.

3. Provided always, and be it enacted, that nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary or alter any right, title, or possession, derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in force, and have effect, as if this Act had never been made.

nor to make void other rights formerly granted.

4. And whereas the provisions made by the said proclamation, in respect to the civil Government of the said Province of Quebec, and the powers and authorities given to the Governor, and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found upon experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted, at the conquest, to above 65,000 persons professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected, governed, and ordered, for a long series of years, from the first establishment of the said Province of Canada;

Former provisions made for the Province to be null and void after May 1, 1775.

Be it therefore further enacted by the authority aforesaid, that the said proclamation, (1) so far as the same

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(1) BY THE KING.

A PROCLAMATION.

GEORGE, R.:—

Whereas we have taken into our Royal consideration the extensive and valuable acquisitions in America, secured to our Crown by the late definitive treaty of peace concluded at Paris the 10th day of February last; and being desirous that all our loving subjects, as well of our kingdoms as of our colonies in America, may avail themselves with all convenient speed of the great benefits and advantages which must accrue therefrom to their commerce, manufactures and navigation; we have thought fit, with the advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving subjects, that we have, with the advice of our said Privy Council, granted our letters patent under our great seal of Great Britain to erect within the countries and islands ceded and confirmed to us by the said treaty four distinct and separate governments styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.:

First, the government of Quebec, bounded on the Labrador coast by the river St. John, and from thence by a line drawn from the head of that river, through the Lake St. John, to the south end of the Lake Nipissim; from whence the said line, crossing the river St. Lawrence and the Lake Champlain in 45 degrees of north latitude, passes along the high lands, which divide the rivers that empty themselves into the said river St. Lawrence, from those which fall into the sea; and also along the north coast of the Bayes des Chaleurs, and the coast of the Gulf of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the island of Anticosti, terminates at the aforesaid river St. John.

relates to the said Province of Quebec, and the commission under the authority whereof the Government of the said Province is at present administered, and all and every the ordinance and ordinances made by the Governor and Council of Quebec for the time being, relative to the civil Government and administration of justice in the said Province, and all commissions to judges and other officers thereof, be, and the same are hereby revoked, annulled, and made void, from and after the first day of May, 1775.

Inhabitants of Quebec may profess the Romish religion, subject to the King's supremacy, as by Act 1 Eliz.;

5. And, for the more perfect security and ease of the minds of the inhabitants of the said Province, it is hereby declared, that His Majesty's subjects, professing the religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy the free exercise of the religion of the Church of Rome, subject to

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Secondly, the government of East Florida, bounded to the westward by the Gulf of Mexico and the Apalachicola river; to the northward, by a line drawn from that part of the said river where the Catahouchee and Flint rivers meet, to the source of St. Mary's river, and by the course of the said river to the Atlantic Ocean; and to the east and south by the Atlantic Ocean, and the Gulf of Florida, including all islands within six leagues of the sea coast.

Thirdly, the government of West Florida, bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast from the river Apalachicola to Lake Pontchartrain; to the westward by the said lake, the Lake Maurepas, and the river Mississippi; to the northward, by a line drawn due east from that part of the river Mississippi which lies in thirty-one degrees north latitude, to the river Apalachicola, or Catahouchee: and to the eastward by the said river.

Fourthly, the government of Grenada, comprehending the island of that name together with the Grenadines, and the islands of Dominico, St. Vincent and Tobago.

And to the end that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands, we have thought fit, with the advice of our said Privy Council, to put all that coast, from the river St. John's to Hudson's Streights, together with the islands of Anticosti and Madelane, and all other smaller islands lying upon the said coast, under the care and inspection of our Governor of Newfoundland.

We have also, with the advice of our Privy Council, thought fit to annex the islands of St. John and Cape Breton, or Isle Royale, with the lesser islands adjacent thereto to our government of Nova Scotia.

We have also, with the advice of our Privy Council aforesaid, annexed to our Province of Georgia all the lands lying between the rivers Attamaha and St. Mary's. And whereas it will greatly contribute to the speedy settling our said new governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become inhabitants thereof; we have thought fit to publish and declare by this our proclamation, that we have, in the letters patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of our said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America, which are under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representa-

the King's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth, over all the Dominions and Countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive, and enjoy, their accustomed dues and rights, with respect to such persons only as shall profess the said religion. and the clergy enjoy their accustomed dues.

6. Provided nevertheless, that it shall be lawful for His Majesty, his heirs or successors, to make such provision out of the rest of the said accustomed dues and rights, for the encouragement of the Protestant religion, and for the maintenance and support of a Protestant clergy within the said Province, as he or they shall, from time to time, think necessary and expedient. Provision may be made by His Majesty for the support of the Protestant clergy.

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tives of the people, so to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeable to the laws of England, and under such regulations and restrictions as are used in other colonies; and in the meantime, and until such assemblies can be called as aforesaid; all persons inhabiting in, or resorting to, our said colonies, may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of England; for which purpose we have given power under our great seal to the governors of our said colonies respectively, to erect and constitute, with the advice of our said councils respectively, courts of judicature and public justice within our said colonies, for the hearing and determining all causes as well criminal as civil according to law and equity, and as near as may be, agreeable to the laws of England, with liberty to all persons who may think themselves aggrieved by the sentence of such courts in all civil cases, to appeal, under the usual limitations and restrictions, to us, in our Privy Council.

We have also thought fit, with the advice of our Privy Council as aforesaid, to give unto the governors and councils of our said three new colonies upon the continent, full power and authority to settle and agree with the inhabitants of our said new colonies, or to any other person who shall resort thereto, for such lands, tenements, and hereditaments, as are now, or hereafter shall be, in our power to dispose of, and them to grant to any such person or persons, upon such terms, and under such moderate quit rents, services, and acknowledgements, as have been appointed and settled in other colonies, and under such other conditions as shall appear to us to be necessary and expedient for the advantage of the grantees, and the improvement and settlement of our said colonies.

And whereas we are desirous upon all occasions to testify our royal sense and approbation of the conduct and bravery of the officers and soldiers of our armies, and to reward the same, we do hereby command and empower our governors of our said three new colonies and other our governors of our several provinces on the continent of North America, to grant, without fee or reward, to such reduced officers as have served in North America during the late war, and are actually residing there, and shall personally apply for the same, the following quantities of land, subject at the expiration of ten years, to the same quit-rents as other lands are subject to in the province within which they are granted, as also subject to the same conditions of cultivation and improvement, viz.:

To every person having the rank of a field officer, 5,000 acres.

To every captain, 3,000 acres.

To every subaltern or staff officer, 2,000 acres.

No person professing the Romish religion obliged to take the oath of 1 Eliz.; but to take, before the Governor, etc., the following oath.

7. Provided always, and be it enacted, that no person professing the religion of the Church of Rome, and residing in the said Province, shall be obliged to take the oath required by the said statute, passed in the first year of the reign of Queen Elizabeth, or any other oaths substituted by any other Act in the place thereof; but that every such person who, by the said statute, is required to take the oath therein mentioned, shall be obliged, and is hereby required, to take and subscribe the following oath before the Governor or such other person in such Court of Record as His Majesty shall appoint, who are hereby authorized to administer the same; videlicet,

The Oath.

I, A. B., do sincerely promise and swear, that I will be faithful, and bear true allegiance to His Majesty King

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To every non-commission officer, 200 acres.

To every private man, 50 acres.

We do likewise authorize and require the governors and commanders-in-chief of all our said colonies upon the continent of North America to grant the like quantities of land, and upon the same conditions, to such reduced officers of our navy of like rank, as served on board our ships of war in North America at the times of the reduction of Louisbourg and Quebec in the late war, and who shall personally apply to our respective governors for such grants. And whereas it is just and reasonable, and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds; we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure, that no governor or commander-in-chief, in any of our colonies of Quebec, East Florida, or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments, as described in their commissions; as also that no governor or commander-in-chief of our other colonies or plantations in America, do presume for the present, and until our further pleasure be known, to grant warrant of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west or north-west; or upon any lands whatever, which not having been ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them.

And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid; and we do hereby strictly forbid on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

And we do further strictly enjoin and require all persons whatever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands, which not having been ceded to, or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

George, and him will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever, which shall be made against his person, crown, and dignity; and I will do my utmost endeavour to disclose and make known to His Majesty, his heirs and successors, all treasons and traitorous conspiracies and attempts, which I shall know to be against him, or any of them; and all this I do swear without any equivocation, mental evasion, or secret reservation, and renouncing all pardons and dispensations from any power or person whomsoever, to the contrary. So help me God.

And every such person who shall neglect or refuse to take the said oath before mentioned, shall incur and be liable to the same penalties, forfeitures, disabilities, and

Persons refusing the oath to be subject to the penalties by Act 1 Eliz.

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent we do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but that if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the governor or commander-in-chief of our colony respectively within which they shall lie: and in case they shall lie within the limits of any proprietaries, conformable to such directions and instructions as we or they shall think proper to give for that purpose; and we do, by the advice of our Privy Council, declare and enjoin, that the trade of the said Indians shall be free and open to all our subjects whatever, provided that every person who may incline to trade with the said Indians, do take out a license for carrying on such trade, from the governor or commander-in-chief of any of our colonies respectively, where such person shall reside, and also give security to observe such regulations as we shall at any time think fit, by ourselves or commissaries, to be appointed for this purpose, to direct and appoint for the benefit of the said trade. And we do hereby authorize, enjoin, and require the governors and commanders-in chief of all our colonies respectively, as well those under our immediate government, as those under the government and direction of proprietaries, to grant such licenses without fee or reward, taking especial care to insert therein a condition that such license shall be void, and the security forfeited, in case the person, to whom the same is granted, shall refuse or neglect to observe such regulations as we shall think proper to prescribe as aforesaid.

And we do further expressly enjoin and require all officers whatever, as well military as those employed in the management and direction of Indian affairs within the territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all persons whatever, who standing charged with treasons, misprisions of treasons, murders, or other felonies or misdemeanours, shall fly from justice and take refuge in the said territory, and to send them under a proper guard to the colony where the crime was committed of which they shall stand accused, in order to take their trial for the same.

Given at our court, at St. James', the 7th day of October, 1763, in the third year of our reign.

God save the King.

incapacities, as he would have incurred and been liable to for neglecting or refusing to take the oath required by the said statute passed in the first year of the reign of Queen Elizabeth.

His Majesty's Canadian subjects (religious orders excepted) may hold all their possessions, etc., and in matters of controversy, resort may be had to the laws of Canada for the decision.

8. And be it further enacted by the authority aforesaid, that all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights in as large, ample, and beneficial manner, as if the said proclamation, commissions, ordinances, and other Acts and instruments had not been made, and as may consist with their allegiance to His Majesty and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the Courts of Justice to be appointed within and for the said Province by His Majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinances that shall, from time to time, be passed in the said Province by the Governor, Lieutenant-Governor, or Commander-in-Chief, for the time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in manner hereinafter mentioned.

Not to extend to lands granted by His Majesty in common soccage.

9. Provided always, that nothing in this said Act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, his heirs and successors, to be in free and common soccage.

Owners of goods may alienate the same by will, etc., if executed according to the laws of Canada,

10. Provided also, that it shall and may be lawful to and for every person that is owner of any lands, goods or credits in the said Province, and that has a right to alienate the said lands, goods or credits in his or her lifetime, by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death, by his or her last will and testament; any law, usage or custom, heretofore or now prevailing in the Province, to the contrary hereof in anywise notwithstanding; such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England.

criminal law of England to be continued in the Province.

11. And whereas, the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants from an experience of more than nine years, during which it has been uniformly administered; be it therefore further enacted by the authority aforesaid, that the same shall continue to be administered, and shall be observed as law in the Province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial; and the punishments and forfeitures thereby inflicted to the exclusion of every other rule of criminal law or mode of proceeding thereon, which did or might prevail in the said Province before the year of our Lord 1764; anything in this Act to the contrary thereof in any respect notwithstanding; subject nevertheless to such alterations and amendments as the Governor, Lieutenant-Governor, or Commander-in-Chief for the time being, by and with the advice and consent of the Legislative Council of the said Province, hereafter to be appointed, shall, from time to time, cause to be made therein, in manner hereinafter directed.

[*The following sections, 12 to 16, are repealed by 31 Geo. III., cap. 31, sec. 1.*]

His Majesty may appoint a Council for the affairs of the Province;

12. And whereas it may be necessary to ordain many regulations for the future welfare and good government of the Province of Quebec, the occasions of which cannot now be foreseen, nor, without much delay and inconvenience, be provided for, without intrusting that authority, for a certain time, and under proper restrictions, to persons resident there: and whereas it is at present inexpedient to call an assembly; be it therefore enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, his heirs and successors, by warrant under his or their signet or sign manual, and with the advice of the Privy Council, to constitute and appoint a Council for the affairs of the Province of Quebec, to consist of such persons resident there, not exceeding twenty-three, nor less than seventeen, as His Majesty, his heirs and successors shall be pleased to appoint; and, upon the death, removal, or absence of any of the members of the said Council, in like manner to constitute and appoint such and so many other person or persons as shall be necessary to supply the vacancy or vacancies; which Council, so appointed and

which Council may make Ordinances, with consent of the Governor.

nominated, or the major part thereof, shall have power and authority to make ordinances for the peace, welfare, and good government of the said Province, with the consent of His Majesty's Governor, or, in his absence, of the Lieutenant-Governor, or Commander in Chief for the time being.

The Council are not empowered to lay taxes, public roads or buildings excepted.

13. Provided always, That nothing in this Act contained shall extend to authorise or impower the said Legislative Council to lay any taxes or duties within the said Province, such rates and taxes only excepted as the inhabitants of any town or district within the said Province may be authorised by the said Council to assess, levy, and apply, within the said town or district, for the purpose of making roads, erecting and repairing public buildings, or for any other purpose respecting the local convenience and economy of such town or district.

Ordinances made to be laid before His Majesty for his approbation.

14. Provided also, and be it enacted by the authority aforesaid, that every Ordinance so to be made, shall, within six months, be transmitted by the Governor, or, in his absence, by the Lieutenant-Governor, or Commander in Chief for the time being, and laid before His Majesty for his royal approbation; and if His Majesty shall think fit to disallow thereof, the same shall cease and be void from the time that His Majesty's Order in Council thereupon shall be promulgated at Quebec.

Ordinances touching religion not to be in force without His Majesty's approbation.

15. Provided also, That no Ordinance touching religion, or by which any punishment may be inflicted greater than fine or imprisonment for three months, shall be of any force or effect, till the same shall have received His Majesty's approbation.

When Ordinances are to be passed by a majority.

16. Provided also, That no Ordinance shall be passed at any meeting of the Council where less than a majority of the whole Council is present, or at any time except between the first day of January and the first day of May, unless upon some urgent occasion, in which case every member thereof resident at Quebec, or within fifty miles thereof, shall be personally summoned by the Governor, or, in his absence, by the Lieutenant-Governor, or Commander in Chief for the time being, to attend the same.

Nothing to hinder His Majesty to constitute Courts of Criminal, Civil, and Ecclesiastical jurisdiction.

17. And be it further enacted by the authority aforesaid, That nothing herein contained shall extend, or be construed to extend, to prevent or hinder His Majesty, his heirs and successors, by his or their letters patent under the Great Seal of Great Britain, from erecting, constituting, and appointing such Courts of Criminal, Civil, and

Ecclesiastical jurisdiction within and for the said Province of Quebec, and appointing, from time to time, the Judges and officers thereof, as His Majesty, his heirs and successors, shall think necessary and proper for the circumstances of the said Province.

All Acts formerly made are hereby inforced within the Province.

18. Provided always, and it is hereby enacted, That nothing in this Act contained shall extend, or be construed to extend, to repeal or make void, within the said Province of Quebec, any Act or Acts of the Parliament of Great Britain heretofore made, for prohibiting, restraining, or regulating, the trade or commerce of His Majesty's Colonies and Plantations in America; but that all and every the said Acts, and also all Acts of Parliament heretofore made concerning or respecting the said Colonies and Plantations, shall be, and are hereby declared to be, in force within the said Province of Quebec, and every part thereof.

IMP. ACT 18 GEO. III. CAP. 12—1778.

AN ACT FOR REMOVING ALL DOUBTS AND APPREHENSIONS CONCERNING TAXATION BY THE PARLIAMENT OF GREAT BRITAIN IN ANY OF THE COLONIES, PROVINCES, AND PLANTATIONS IN NORTH AMERICA AND THE WEST INDIES; AND FOR REPEALING SO MUCH OF AN ACT MADE IN THE SEVENTH YEAR OF THE REIGN OF HIS PRESENT MAJESTY, AS IMPOSES A DUTY ON TEA IMPORTED FROM GREAT BRITAIN INTO ANY COLONY OR PLANTATION IN AMERICA, OR RELATES THERETO.

Preamble.

Whereas taxation by the parliament of Great Britain, for the purpose of raising a revenue in His Majesty's colonies, provinces, and plantations in North America, has been found by experience to occasion great uneasinesses and disorders among his Majesty's faithful subjects, who may nevertheless be disposed to acknowledge the justice of contributing to the common defence of the empire, provided such contribution should be raised under the authority of the general court, or general assembly of each respective colony, province, or plantation: and whereas, in order as well to remove the said uneasinesses, and to quiet the minds of His Majesty's subjects who may be disposed to return to their allegiance, as to restore the peace and welfare of all His Majesty's dominions, it is expedient to declare that the King and parliament of Great Britain will not impose any duty, tax, or assessment, for the purpose of raising a revenue in any of the colonies, provinces, or plantations: May it please your Majesty that it may be declared and enacted, and it is hereby declared and enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present parliament assembled, and by the authority of the same.

No tax to be imposed on the colonies by the parliament of Great Britain.

1. That from and after the passing of this Act, the King and parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of His Majesty's colonies, provinces, and plantations in North America or the West Indies, except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation, in which the same shall be respectively levied,

Except duties for the regulation of trade to be applied for the use of the colony.

in such manner as other duties collected by the authority of the respective general courts, or general assemblies of such colonies, provinces, or plantations, are ordinarily paid and applied.

2. That from and after the passing of this Act, so much of an Act made in the seventh year of his present Majesty's reign, intituled, "An Act for granting certain duties in the British colonies and plantations in America; for allowing a drawback of the duties of customs upon the exportation from this Kingdom of coffee and cocoa-nuts of the produce of the said colonies or plantations; for discontinuing the drawbacks payable on China earthenware exported to America; and for more effectually preventing the clandestine running of goods in the said colonies and plantations," as imposes a duty on tea imported from Great Britain into any colony or plantation in America, or has relation to the said duty, be, and the same is hereby repealed. 7 Geo. III., c. 46, repealed.

IMP. ACT 31 GEO. III, CAP. 31—1791.

Respecting Division of Province of Quebec into Provinces of Upper and Lower Canada.

AN ACT TO REPEAL CERTAIN PARTS OF AN ACT PASSED IN THE FOURTEENTH YEAR OF HIS MAJESTY'S REIGN, ENTITULED "AN ACT FOR MAKING MORE EFFECTUAL PROVISION FOR THE GOVERNMENT OF THE PROVINCE OF QUEBEC, IN NORTH AMERICA; AND TO MAKE FURTHER PROVISION FOR THE GOVERNMENT OF THE SAID PROVINCE."

Preamble. 14 Geo. 3. cap. 83, recited.

Whereas, an Act was passed in the fourteenth year of the reign of His present Majesty, intituled, "An Act for making more effectual provision for the Government of the Province of Quebec in North America;" and whereas the said Act is in many respects inapplicable to the present condition and circumstances of the said Province; and whereas it is expedient and necessary that further provision should now be made for the good Government and prosperity thereof: May it therefore please Your Most Excellent Majesty, that it may be enacted; and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that so much of the said Act as in any manner relates to the appointment of a Council for the affairs of the said Province of Quebec, or to the power given by the said Act to the said Council, or to the major part of them, to make ordinances for the peace, welfare, and good Government of the said Province, with the consent of His Majesty's Governor, Lieutenant-Governor, or Commander in Chief for the time being, shall be, and the same is hereby repealed.

So much of recited Act as relates to the appointment of a Council for Quebec, or its powers, repealed.

[*The following sections from 2 to 32, inclusive, are repealed by 3 & 4 V. c. 35, s. 2; the Act for the Union of Upper and Lower Canada.*]

Within each of the intended Provinces a Legislative Council and Assembly to be constituted,

2. And whereas His Majesty has been pleased to signify, by his message to both Houses of Parliament, his royal intention to divide his Province of Quebec into two separate Provinces, to be called the Province of Upper Canada, and the Province of Lower Canada; be it enact-

ed by the authority aforesaid, that there shall be within each of the said Provinces respectively a Legislative Council, and an Assembly to be severally composed and constituted in the manner hereinafter described; and that in each of the said Provinces respectively His Majesty, his heirs or successors, shall have power, during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such Provinces respectively, to make laws for the peace, welfare, and good Government thereof, such laws not being repugnant to this Act; and that all such laws, being passed by the Legislative Council and Assembly of either of the said Provinces respectively, and assented to by His Majesty, his heirs or successors, or assented to in His Majesty's name, by such person as His Majesty, his heirs or successors, shall from time to time appoint to be the Governor, or Lieutenant-Governor, of such Province, or by such person as His Majesty, his heirs and successors, shall from time to time appoint to administer the Government within the same, shall be, and the same are hereby declared to be, by virtue of and under the authority of this Act, valid and binding to all intents and purposes whatever, within the Province in which the same shall have been so passed.

by whose advice His Majesty may make laws for the Government of the Province.

3. And be it further enacted by the authority aforesaid, That for the purpose of constituting such Legislative Council as aforesaid in each of the said Provinces respectively, it shall and may be lawful for His Majesty, his heirs or successors, by an instrument under his or their sign manual, to authorize and direct the Governor or Lieutenant-Governor, or person administering the Government in each of the said Provinces respectively, within the time hereinafter mentioned, in His Majesty's name, and by an instrument under the Great Seal of such Province, to summon to the said Legislative Council, to be established in each of the said Provinces respectively, a sufficient number of discreet and proper persons, being not fewer than seven, to the Legislative Council for the Province of Upper Canada, and not fewer than fifteen to the Legislative Council for the Province of Lower Canada; and that it shall also be lawful for His Majesty, his heirs or successors, from time to time, by an instrument under his or their sign manual, to authorize and direct the Governor or Lieutenant-Governor, or person administer-

His Majesty may authorize the Governor, or Lieutenant-Governor, of each Province, to summon members to the Legislative Council.

ing the Government in each of the said Provinces respectively, to summon to the Legislative Council of such Province, in like manner, such other person or persons as His Majesty, his heirs or successors, shall think fit; and that every person who shall be so summoned to the Legislative Council of either of the said Provinces respectively, shall thereby become a member of such Legislative Council to which he shall have been so summoned.

No person under 21 years of age, etc., to be summoned.

4. Provided always, and be it enacted by the authority aforesaid, That no person shall be summoned to the said Legislative Council, in either of the said Provinces, who shall not be of the full age of twenty-one years, and a natural born subject of His Majesty, or a subject of His Majesty naturalized by Act of the British Parliament, or a subject of His Majesty, having become such by the conquest and cession of the Province of Canada.

Members to hold their seats for life.

5. And be it further enacted by the authority aforesaid, That every member of each of the said Legislative Councils shall hold his seat therein for the term of his life, but subject, nevertheless, to the provisions hereinafter contained for vacating the same in the cases hereinafter specified.

His Majesty may annex to hereditary titles of honour, the right of being summoned to the Legislative Council.

6. And be it further enacted by the authority aforesaid, That whenever His Majesty, his heirs or successors, shall think proper to confer upon any subject of the Crown of Great Britain, by Letters Patent under the Great Seal of either of the said Provinces, any hereditary title of honour, rank, or dignity of such Province, descendible according to any course of descent limited in such Letters Patent, it shall and may be lawful for His Majesty, his heirs or successors, to annex thereto, by the said Letters Patent, if His Majesty, his heirs or successors, shall so think fit, an hereditary right of being summoned to the Legislative Council of such Province, descendible according to the course of descent so limited with respect to such title, rank, or dignity; and that every person on whom such right shall be so conferred, or to whom such right shall severally so descend, shall thereupon be entitled to demand from the Governor, Lieutenant-Governor, or person administering the Government of such Province, his writ of summons to such Legislative Council, at any time after he shall have attained the age of twenty-one years, subject, nevertheless, to the provisions hereinafter contained.

Such descendible right forfeited, and

7. Provided always, and be it further enacted by the authority aforesaid, That when and so often as any person

to whom such hereditary right shall have descended shall, without the permission of His Majesty, his heirs or successors, signified to the Legislative Council of the Province by the Governor, Lieutenant-Governor, or person administering the Government there, have been absent from the said Province for the space of four years continually, at any time between the date of his succeeding to such right and the time of his applying for such writ of summons, if he shall have been of the age of twenty-one years or upwards at the time of his so succeeding, or at any time between the date of his attaining the said age, and the time of his so applying, if he shall not have been of the said age at the time of his so succeeding; and also when and so often as any such person shall at any time, before his applying for such writ of summons, have taken any oath of allegiance or obedience to any foreign prince or power, in every such case such person shall not be entitled to receive any writ of summons to the Legislative Council by virtue of such hereditary right, unless His Majesty, his heirs or successors, shall at any time think fit, by instrument under his or their sign manual, to direct that such person shall be summoned to the said Council; and the Governor, Lieutenant-Governor, or person administering the Government in the said Provinces respectively, is hereby authorized and required, previous to granting such writ of summons to any person so applying for the same, to interrogate such person upon oath touching the said several particulars, before such Executive Council as shall have been appointed by His Majesty, his heirs or successors, within such Province, for the affairs thereof.

Seats in Council vacated in certain cases.

8. Provided also, and be it further enacted by the authority aforesaid, That if any member of the Legislative Councils of either of the said Provinces respectively, shall leave such Province, and shall reside out of the same for the space of four years continually, without the permission of His Majesty, his heirs or successors, signified to such Legislative Council by the Governor or Lieutenant-Governor, or person administering His Majesty's Government there, or for the space of two years continually, without the like permission, or the permission of the Governor, Lieutenant-Governor or person administering the Government of such Province, signified to such Legislative Council in the manner aforesaid; or if any such member shall take any oath of allegiance or obedience to

any foreign prince or power, his seat in such Council shall thereby become vacant.

Hereditary rights and seats so forfeited or vacated to remain suspended during the lives of the parties, but on their deaths to go to the persons next entitled thereto.

9. Provided also, and be it further enacted by the authority aforesaid, That in every case where a writ of summons to such Legislative Council shall have been lawfully withheld from any person to whom such hereditary right as aforesaid shall have descended, by reason of such absence from the Province as aforesaid, or of his having taken an oath of allegiance or obedience to any foreign prince or power, and also in every case where the seat in such Council of any member thereof, having such hereditary right as aforesaid, shall have been vacated by reason of any of the causes hereinbefore specified, such hereditary right shall remain suspended during the life of such person, unless His Majesty, his heirs or successors, shall afterwards think fit to direct that he be summoned to such Council; but that on the death of such person such right, subject to the provisions herein contained, shall descend to the person who shall next be entitled thereto, according to the course of descent limited in the Letters Patent by which the same shall have been originally conferred.

Seats in Council forfeited, and hereditary rights extinguished for treason.

10. Provided also, and be it further enacted by the authority aforesaid, That if any member of either of the said Legislative Councils shall be attainted for treason in any Court of Law within any of His Majesty's Dominions, his seat in such Council shall thereby become vacant, and any such hereditary right as aforesaid then vested in such person, or to be derived to any other persons through him, shall be utterly forfeited and extinguished.

Questions respecting the right to be summoned to Council, etc., to be determined as herein mentioned.

11. Provided also, and be it further enacted by the authority aforesaid, That whenever any question shall arise respecting the right of any person to be summoned to either of the said Legislative Councils respectively, or respecting the vacancy of the seat in such Legislative Council of any person having been summoned thereto, every such question shall, by the Governor or Lieutenant-Governor of the Province, or by the person administering the Government there, be referred to such Legislative Council, to be by the said Council heard and determined; and that it shall and may be lawful either for the person desiring such writ of summons, or respecting whose seat such question shall have arisen, or for His Majesty's Attorney-General of such Province in His Majesty's name, to appeal from the determination of the said Council, in

such case, to His Majesty in his Parliament of Great Britain; and that the judgment thereon of His Majesty in his said Parliament shall be final and conclusive to all intents and purposes whatever.

The Governor of the Province may appoint and remove the Speaker.

12. And be it further enacted by the authority aforesaid, That the Governor or Lieutenant-Governor of the said Provinces respectively, or the person administering His Majesty's Government therein respectively, shall have power and authority from time to time, by an instrument under the Great Seal of such Province, to constitute, appoint, and remove the Speakers of the Legislative Councils of such Provinces respectively.

His Majesty may authorise the Governor to call together the Assembly,

13. And be it further enacted by the authority aforesaid, That, for the purpose of constituting such Assembly as aforesaid, in each of the said Provinces respectively, it shall and may be lawful for His Majesty, his heirs or successors, by an instrument under his or their sign manual, to authorise and direct the Governor or Lieutenant-Governor, or person administering the Government in each of the said Provinces respectively, within the time hereinafter mentioned, and thereafter from time to time, as occasion shall require, in His Majesty's name, and by an instrument under the Great Seal of such Province, to summon and call together an Assembly in and for such Province.

and, for the purpose of electing members, to issue a proclamation dividing the Province into districts, etc.

14. And be it further enacted by the authority aforesaid, That, for the purpose of electing the members of such Assemblies respectively, it shall and may be lawful for His Majesty, his heirs or successors, by an instrument under his or their sign manual, to authorise the Governor, or Lieutenant-Governor, of each of the said Provinces respectively, or the person administering the Government therein, within the time hereinafter mentioned, to issue a proclamation dividing such Province into districts, or counties, or circles, and towns or townships, and appointing the limits thereof, and declaring and appointing the number of representatives to be chosen by each of such districts, or counties, or circles, and towns or townships respectively; and that it shall also be lawful for His Majesty, his heirs, or successors, to authorise such Governor, or Lieutenant-Governor, or person administering the Government, from time to time, to nominate and appoint proper persons to execute the office of returning officer in each of the said districts, or counties, or circles, and towns or townships respectively; and that such division of the said Provinces into districts, or counties, or circles, and

towns or townships, and such declaration and appointment of the number of representatives to be chosen by each of the said districts, or counties, or circles, and towns or townships respectively, and also such nomination and appointment of returning officers in the same, shall be valid and effectual to all the purposes of this Act, unless it shall at any time be otherwise provided by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors.

Power of the Governor to appoint returning officers, to continue two years from the commencement of this Act.

15. Provided nevertheless, and be it further enacted by the authority aforesaid, that the provision hereinbefore contained, for impowering the Governor, Lieutenant-Governor, or person administering the Government of the said Provinces respectively, under such authority as aforesaid from His Majesty, his heirs or successors, from time to time, to nominate and appoint proper persons to execute the office of returning officer in the said districts, counties, circles, and towns or townships, shall remain and continue in force in each of the said Provinces respectively, for the term of two years, from and after the commencement of this Act, within such Province, and no longer; but subject nevertheless to be sooner repealed or varied by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors.

No person obliged to serve as returning officer more than once, unless otherwise provided by an Act of the Province.

16. Provided always, and be it further enacted by the authority aforesaid, that no person shall be obliged to execute the said office of returning officer for any longer time than one year, or oftener than once, unless it shall at any time be otherwise provided by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors.

Number of members in each Province.

17. Provided also, and be it enacted by the authority aforesaid, that the whole number of Members to be chosen in the Province of Upper Canada shall not be less than sixteen, and that the whole number of Members to be chosen in the Province of Lower Canada shall not be less than fifty.

Regulations for issuing writs for the election of members to serve in the Assemblies.

18. And be it further enacted by the authority aforesaid, that writs for the election of Members to serve in the said Assemblies respectively shall be issued by the Governor, Lieutenant-Governor, or person administering His Majesty's Government within the said Provinces respectively, within fourteen days after the sealing of such instrument as aforesaid for summoning and calling

together such Assembly, and that such writs shall be directed to the respective returning officers of the said districts, or counties, or circles, and towns or townships, and that such writs shall be made returnable within fifty days at farthest from the day on which they shall bear date, unless it shall at any time be otherwise provided by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors; and that writs shall in like manner and form be issued for the election of Members in the case of any vacancy which shall happen by the death of the person chosen, or by his being summoned to the Legislative Council of either Province, and that such writs shall be made returnable within fifty days at farthest from the day on which they shall bear date, unless it shall at any time be otherwise provided by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors; and that in the case of any such vacancy which shall happen by the death of the person chosen, or by reason of his being so summoned as aforesaid, the writ for the election of a new Member shall be issued within six days after the same shall be made known to the proper office for issuing such writs of election.

Returning officers to execute writs.

19. And be it further enacted by the authority aforesaid, that all and every the returning officers so appointed as aforesaid, to whom any such writs as aforesaid shall be directed, shall, and they are hereby authorised and required duly to execute such writs.

By whom the members are to be chosen.

20. And be it further enacted by the authority aforesaid, that the members for the several districts, or counties, or circles of the said Provinces respectively, shall be chosen by the majority of votes of such persons as shall severally be possessed, for their own use and benefit, of lands or tenements within such district, or county, or circle, as the case shall be, such lands being by them held in freehold, or in fief, or in roture, or by certificate derived under the authority of the Governor and Council of the Province of Quebec, and being of the yearly value of forty shillings sterling, or upwards, over and above all rents and charges payable out of or in respect of the same; and that the members for the several towns or townships within the said Provinces respectively, shall be chosen by the majority of votes of such persons as either shall severally be possessed, for their own use and

benefit, of a dwelling house and lot of ground in such town or township, such dwelling house and lot of ground being by them held in like manner as aforesaid, and being of the yearly value of five pounds sterling, or upwards, or as having been resident within the said town or township for the space of twelve calendar months next before the date of the writ of summons for the election, shall *bonâ fide* have paid one year's rent for the dwelling house in which they shall have so resided, at the rate of ten pounds sterling per annum, or upwards.

Certain persons not eligible to the Assemblies.

21. Provided always, and be it further enacted by the authority aforesaid, that no person shall be capable of being elected a Member to serve in either of the said Assemblies, or of sitting or voting therein, who shall be a Member of either of the said Legislative Councils to be established as aforesaid in the said two Provinces, or who shall be a minister of the Church of England, or a minister, priest, ecclesiastic, or teacher, either according to the rites of the Church of Rome, or under any other form or profession of religious faith or worship.

No person under 21 years of age, etc., capable of voting or being elected;

22. Provided also, and be it further enacted by the authority aforesaid, that no person shall be capable of voting at any election of a member to serve in such Assembly, in either of the said Provinces, or of being elected at any such election, who shall not be of the full age of twenty-one years, and a natural-born subject of His Majesty, or a subject of His Majesty naturalized by Act of the British Parliament, or a subject of His Majesty having become such by the conquest and cession of the Province of Canada.

nor any person attainted for treason or felony.

23. And be it also enacted by the authority aforesaid, that no person shall be capable of voting at any election of a Member to serve in such Assembly, in either of the said Provinces, or of being elected at any such election, who shall have been attainted for treason or felony in any Court of law within any of His Majesty's dominions, or who shall be within any description of persons disqualified by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors.

Voters, if required, to take the following

24. Provided also, and be it further enacted by the authority aforesaid, that every voter, before he is admitted to give his vote at any such election, shall, if required by any of the candidates, or by the returning officer, take the following oath, which shall be admin-

istered in the English or French language, as the case may require:

"I, A. B., do declare and testify, in the presence of Almighty God, that I am, to the best of my knowledge and belief, of the full age of twenty-one years, and that I have not voted before at this election." Oath.

And that every such person shall also, if so required as aforesaid, make oath previous to his being admitted to vote, that he is, to the best of his knowledge and belief, duly possessed of such lands and tenements, or of such a dwelling house and lot of ground, or that he has *bonâ fide* been so resident, and paid such rent for his dwelling house as entitles him, according to the provisions of this Act, to give his vote at such election for the county, or district, or circle, or for the town or townships for which he shall offer the same. And to make oath to the particulars herein specified.

25. And be it further enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor, or Lieutenant-Governor, or person administering the Government within each of the said Provinces respectively, to fix the time and place of holding such elections, giving not less than eight days' notice of such time, subject nevertheless to such provisions as may hereafter be made in these respects by any Act of the Legislative Council and Assembly of the Province, assented to by His Majesty, his heirs or successors. His Majesty may authorize the Governor to fix the time and place of holding elections,

26. And be it further enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor, or Lieutenant-Governor, of each of the said Provinces respectively, or the person administering the Government therein, to fix the places and times of holding the first and every other Session of the Legislative Council and Assembly of such Province, giving due and sufficient notice thereof, and to prorogue the same, from time to time, and to dissolve the same, by proclamation or otherwise, whenever he shall judge it necessary or expedient. and of holding the Sessions of the Council and Assembly, etc.

27. Provided always, and be it enacted by the authority aforesaid, that the said Legislative Council and Assembly, in each of the said Provinces, shall be called together once at the least in every twelve calendar months' and that every Assembly shall continue for four years from the day of the return of the writs for choosing the same, and no longer, subject nevertheless to be sooner prorogued Council and Assembly to be called together once in twelve months, etc.

or dissolved by the Governor or Lieutenant-Governor of the Province, or person administering His Majesty's Government therein.

And all questions therein to be decided by the majority of votes.

28. And be it further enacted by the authority aforesaid, That all questions which shall arise in the said Legislative Councils or Assemblies respectively, shall be decided by the majority of voices of such members as shall be present; and that in all cases where the voices shall be equal, the Speaker of such Council or Assembly, as the case shall be, shall have a casting voice.

No member to sit or vote till he has taken the following

29. Provided always, and be it enacted by the authority aforesaid, That no member, either of the Legislative Council or Assembly, in either of the said Provinces, shall be permitted to sit or to vote therein until he shall have taken and subscribed the following oath, either before the Governor or Lieutenant-Governor of such Province, or person administering the Government therein, or before some person or persons authorized by the said Governor, or Lieutenant-Governor, or other person as aforesaid, to administer such oath, and that the same shall be administered in the English or French language, as the case shall require:

Oath.

"I, A. B., do sincerely promise and swear, that I will be faithful, and bear true allegiance to His Majesty King George, as lawful Sovereign of the Kingdom of Great Britain, and of these Provinces dependent on and belonging to the said Kingdom; and that I will defend him to the utmost of my power against all traitorous conspiracies and attempts whatever, which shall be made against his person, crown, and dignity; and that I will do my utmost endeavour to disclose and make known to His Majesty, his heirs or successors, all treasons and traitorous conspiracies and attempts which I shall know to be against him, or any of them; and all this I do swear without any equivocation, mental evasion, or secret reservation, and renouncing all pardons and dispensations from any person or power whatever to the contrary.

"So help me God."

Governor may give or withhold His Majesty's assent to Bills passed by the Legislative Council and

30. And be it further enacted by the authority aforesaid, That whenever any bill which has been passed by the Legislative Council, and by the House of Assembly, in either of the said Provinces respectively, shall be presented for His Majesty's assent, to the Governor or Lieutenant-Governor of such Province, or to the person

administering His Majesty's Government therein, such Governor, or Lieutenant-Governor, or person administering the Government, shall, and he is hereby authorized and required to declare, according to his discretion, but subject nevertheless to the provisions contained in this Act, and to such instructions as may from time to time be given in that behalf by His Majesty, his heirs or successors, that he assents to such bill in His Majesty's name, or that he withholds His Majesty's assent from such bill, or that he reserves such bill for the signification of His Majesty's pleasure thereon.

Assembly, or reserve them for His Majesty's pleasure.

31. Provided always, and be it further enacted by the authority aforesaid, That whenever any bill, which shall have been so presented for His Majesty's assent to such Governor, Lieutenant-Governor, or person administering the Government, shall, by such Governor, Lieutenant-Governor, or person administering the Government, have been assented to in His Majesty's name, such Governor, Lieutenant-Governor, or person as aforesaid, shall, and he is hereby required, by the first convenient opportunity, to transmit to one of His Majesty's principal Secretaries of State, an authentic copy of such bill so assented to; and that it shall and may be lawful, at any time within two years after such bill shall have been so received by such Secretary of State, for His Majesty, his heirs or successors, by his or their Order in Council, to declare his or their disallowance of such bill, and that such disallowance, together with a certificate, under the hand and seal of such Secretary of State, testifying the day on which such bill was received as aforesaid, being signified by such Governor, Lieutenant-Governor, or person administering the Government, to the Legislative Council and Assembly of such Province, or by proclamation, shall make void and annul the same, from and after the date of such signification.

Governor to transmit to the Secretary of State, copies of such Bills as have been assented to, which His Majesty in Council may declare his disallowance of within two years from the receipt.

32. And be it further enacted by the authority aforesaid, That no such bill, which shall be so reserved for the signification of His Majesty's pleasure thereon, shall have any force or authority within either of the said Provinces respectively, until the Governor, or Lieutenant-Governor, or person administering the Government, shall signify, either by speech or message, to the Legislative Council and Assembly of such Province, or by proclamation, that such bill has been laid before His Majesty in Council, and that His Majesty has been pleased to

Bills reserved for His Majesty's pleasure not to have any force till His Majesty's assent be communicated to the Council and Assembly, etc.

assent to the same; and that an entry shall be made in the journals of the said Legislative Council, of every such speech, message or proclamation; and a duplicate thereof, duly attested, shall be delivered to the proper officer to be kept amongst the public records of the Province: and that no such bill, which shall be so reserved as aforesaid, shall have any force or authority within either of the said Provinces respectively, unless His Majesty's assent thereto shall have been so signified as aforesaid, within the space of two years from the day on which such bill shall have been presented for His Majesty's assent to the Governor, Lieutenant-Governor, or person administering the Government of such Province.

Laws in force at the commencement of this Act to continue so, except repealed or varied by it, etc.

33. And be it further enacted by the authority aforesaid, That all laws, statutes, and ordinances, which shall be in force on the day to be fixed in the manner hereinafter directed for the commencement of this Act, within the said Provinces or either of them, or in any part thereof respectively, shall remain and continue to be of the same force, authority, and effect, in each of the said Provinces respectively, as if this Act had not been made, and as if the said Province of Quebec had not been divided; except in so far as the same are expressly repealed or varied by this Act, or in so far as the same shall or may hereafter, by virtue of and under the authority of this Act, be repealed or varied by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Councils and Assemblies of the said Provinces respectively, or in so far as the same may be repealed or varied by such temporary laws or ordinances as may be made in the manner hereinafter specified.

Establishment of a Court of Civil Jurisdiction, in each Province.

34. And whereas by an ordinance passed in the Province of Quebec, the Governor and Council of the said Province were constituted a Court of Civil Jurisdiction, for hearing and determining appeals in certain cases therein specified; be it further enacted by the authority aforesaid, that the Governor or Lieutenant-Governor, or person administering the Government of each of the said Provinces respectively, together with such Executive Council as shall be appointed by His Majesty for the affairs of such Province, shall be a Court of Civil Jurisdiction within each of the said Provinces respectively, for hearing and determining appeals within the same, in the like cases, and in the like manner and form, and

subject to such appeal therefrom, as such appeals might before the passing of this Act have been heard and determined by the Governor and Council of the Province of Quebec, but subject nevertheless to such further or other provisions as may be made in this behalf, by any Act of the Legislative Council and Assembly of either of the said Provinces respectively, assented to by His Majesty, his heirs or successors.

14 Geo. III. c. 83, and

35. And whereas by the above-mentioned Act passed in the fourteenth year of the reign of His present Majesty, it was declared that the clergy of the Church of Rome, in the Province of Quebec, might hold, receive and enjoy their accustomed dues and rights, with respect to such persons only as should profess the said religion; provided, nevertheless, that it should be lawful for His Majesty, his heirs or successors, to make such provision out of the rest of the said accustomed dues and rights, for the encouragement of the Protestant religion, and for the maintenance and support of a Protestant clergy within the said Province, as he or they should from time to time think necessary and expedient: And whereas by His Majesty's royal instructions, given under His Majesty's royal sign manual on the third day of January, in the year of our Lord 1775, to Guy Carleton, Esquire, now Lord Dorchester, at that time His Majesty's Captain-General and Governor-in-Chief in and over His Majesty's Province of Quebec, His Majesty was pleased, amongst other things, to direct "That no incumbent professing the religion of the Church of Rome, appointed to any parish in the said Province, should be entitled to receive any tythes for lands or possessions occupied by a Protestant, but that such tythes should be received by such persons as the said Guy Carleton, Esquire, His Majesty's Captain-General and Governor-in-Chief in and over His Majesty's said Province of Quebec, should appoint, and should be reserved in the hands of His Majesty's Receiver-General of the said Province, for the support of a Protestant clergy in His Majesty's said Province, to be actually resident within the same, and not otherwise, according to such directions as the said Guy Carleton, Esquire, His Majesty's Captain-General and Governor-in-Chief in and over His Majesty's said Province, should receive from His Majesty in that behalf; and that in like manner all growing rents and profits of a vacant benefice should, during such vacancy, be reserved for and applied to the like uses:" And whereas His

Instructions of Jan. 3, 1775, to Sir Guy Carleton, etc., and

Instructions to Sir Frederick Haldimand, and to Lord Dorchester, recited;

Majesty's pleasure has likewise been signified to the same effect in His Majesty's royal instructions, given in like manner to Sir Frederick Haldimand, Knight of the Most Honourable Order of the Bath, late His Majesty's Captain-General and Governor-in-Chief in and over His Majesty's said Province of Quebec; and also in His Majesty's royal instructions, given in like manner to the said Right Honourable Guy, Lord Dorchester, now His Majesty's Captain-General and Governor-in-Chief in and over His Majesty's said Province of Quebec; be it enacted by the authority aforesaid, That the said declaration and provision contained in the said above-mentioned Act, and also the said provision so made by His Majesty in consequence thereof, by his instructions above recited, shall remain and continue to be of full force and effect in each of the said two Provinces of Upper Canada and Lower Canada respectively, except in so far as the said declaration or provisions respectively, or any part thereof, shall be expressly varied or repealed by any Act or Acts which may be passed by the Legislative Council and Assembly of the said Provinces respectively, and assented to by His Majesty, his heirs or successors, under the restriction hereinafter provided.

And the declaration and provisions therein respecting the clergy of the Church of Rome to continue in force.

[*Sections 36 to 41 relate to the reservation of lands for the support of a protestant clergy and the endowment of rectories. The Imp. Act, 3 & 4 V. c. 78, s. 11, repeals so much of this Act as relates to any reservation thereafter to be made; and the Prov. Act, 14 & 15 V. c. 175, repeals sects. 38, 39 and 40, saving past rights if found valid, and directing how the presentation to any rectory which is found to have been legally established shall thereafter be made. The Provincial Act was passed under the authority given by sect. 41 of this Act.*]

His Majesty's message to Parliament recited.

36. And whereas His Majesty has been graciously pleased, by message to both Houses of Parliament, to express his royal desire to be enabled to make a permanent appropriation of lands in the said Provinces, for the support and maintenance of a Protestant clergy within the same, in proportion to such lands as have been already granted within the same by His Majesty: And whereas His Majesty has been graciously pleased, by his said message, further to signify his royal desire that such

provision may be made, with respect to all future grants of land within the said Provinces respectively, as may best conduce to the due and sufficient support and maintenance of a Protestant clergy within the said Provinces, in proportion to such increase as may happen in the population and cultivation thereof: Therefore, for the purpose of more effectually fulfilling His Majesty's gracious intentions as aforesaid, and of providing for the due execution of the same in all time to come, be it enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor or Lieutenant-Governor of each of the said Provinces respectively, or the person administering the Government therein, to make, from and out of the lands of the Crown within such Provinces, such allotment and appropriation of lands, for the support and maintenance of a Protestant clergy within the same, as may bear a due proportion to the amount of such lands within the same as have at any time been granted by or under the authority of His Majesty; and that whenever any grant of lands within any of the said Provinces shall hereafter be made by or under the authority of His Majesty, his heirs or successors, there shall at the same time be made, in respect of the same, a proportionable allotment and appropriation of lands for the above mentioned purpose, within the township or parish to which such lands so to be granted shall appertain or be annexed, or as nearly adjacent thereto as circumstances will admit; and that no such grant shall be valid or effectual unless the same shall contain a specification of the lands so allotted and appropriated in respect of the lands to be thereby granted; and that such lands, so allotted and appropriated, shall be as nearly as the circumstances and nature of the case will admit, of the like quality as the lands in respect of which the same are so allotted and appropriated, and shall be, as nearly as the same can be estimated at the time of making such grant equal in value to the seventh part of the lands so granted.

His Majesty may authorize the Governor to make allotments of lands for the support of a Protestant clergy in each Province:

37. And be it further enacted by the authority aforesaid, That all and every the rents, profits, or emoluments, which may at any time arise from such lands so allotted and appropriated as aforesaid, shall be applicable solely to the maintenance and support of a Protestant clergy within the Province in which the same shall be situated, and to no other use or purpose whatever.

And the rents arising from such allotments to be applicable to that purpose solely.

His Majesty may authorize the Governor, with the advice of the Executive Council, to erect parsonages and endow them;

38. And be it further enacted by the authority aforesaid, That it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor or Lieutenant-Governor of each of the said Provinces respectively, or the person administering the Government therein, from time to time, with the advice of such Executive Council as shall have been appointed by His Majesty, his heirs or successors, within such Province, for the affairs thereof, to constitute and erect, within every township or parish which now is, or hereafter may be formed, constituted, or erected within such Province, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England; and from time to time, by an instrument under the Great Seal of such Province, to endow every such parsonage or rectory with so much or such part of the lands so allotted and appropriated as aforesaid, in respect of any lands within such township or parish, which shall have been granted subsequent to the commencement of this Act, or of such lands as may have been allotted and appropriated for the same purpose, by or in virtue of any instruction which may be given by His Majesty, in respect of any lands granted by His Majesty before the commencement of this Act, as such Governor, Lieutenant-Governor, or person administering the Government, shall, with the advice of the said Executive Council, judge to be expedient under the then existing circumstances of such township or parish.

And the Governor to present incumbents to them, who are to enjoy the same as incumbents in England.

39. And be it further enacted by the authority aforesaid, That it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor, Lieutenant-Governor, or person administering the Government of each of the said Provinces respectively, to present to every such parsonage or rectory an incumbent or minister of the Church of England, who shall have been duly ordained according to the rites of the said church, and to supply from time to time such vacancies as may happen therein; and that every person so presented to any such parsonage or rectory shall hold and enjoy the same, and all rights, profits and emoluments thereunto belonging or granted, as fully and amply, and in the same manner and on the same terms and conditions, and liable to the performance of the same duties as the incumbent of a parsonage or rectory in England.

Presentations to parsonages and the enjoy-

40. Provided always, and be it further enacted by the authority aforesaid, That every such presentation of an

incumbent or minister to any such parsonage or rectory, and also the enjoyment of any such parsonage or rectory, and of the rights, profits and emoluments thereof, by any such incumbent or minister, shall be subject and liable to all rights of institution, and all other spiritual and ecclesiastical jurisdiction and authority which have been lawfully granted by His Majesty's Royal Letters Patent to the Bishop of Nova Scotia, or which may hereafter by His Majesty's royal authority be lawfully granted or appointed to be administered and executed within the said Provinces, or either of them respectively, by the said Bishop of Nova Scotia, or by any other person or persons, according to the laws and canons of the Church of England, which are lawfully made and received in England.

ment of them, to be subject to the jurisdiction granted to the Bishop of Nova Scotia, etc.

41. Provided always, and be it further enacted by the authority aforesaid, That the several provisions hereinbefore contained, respecting the allotment and appropriation of lands for the support of a Protestant clergy within the said Provinces, and also respecting the constituting, erecting and endowing parsonages or rectories within the said Provinces, and also respecting the presentation of incumbents or ministers to the same, and also respecting the manner in which such incumbents or ministers shall hold and enjoy the same, shall be subject to be varied or repealed by any express provisions for that purpose, contained in any Act, or Acts which may be passed by the Legislative Council and Assembly of the said Provinces respectively, and assented to by His Majesty, his heirs or successors, under the restriction hereinafter provided.

Provisions respecting the allotments of lands for the support of a Protestant clergy, etc., may be varied or repealed by the Legislative Council and Assembly.

[*Section 42 applied only to Bills of the Parliament of Upper Canada or of Lower Canada and section 42 of the Union Act (3 & 4 V. c. 35) making like provision as to Bills of the Legislature of Canada was repealed by Imp. Act, 18 & 19 V. c. 118, s. 6, which enabled Her Majesty to assent to any Bill of the Canadian Legislature without the same being laid before the Imperial Parliament and the Governor to assent to any Bill without reserving it for the signification of Her Majesty's pleasure.*]

42. Provided nevertheless, and be it further enacted by the authority aforesaid, That whenever any Act or Acts shall be passed by the Legislative Council and Assembly of either of the said Provinces, containing any provisions to vary or repeal the above recited declaration and pro-

Acts of the Legislative Council and Assembly, containing provisions to the effect

herein mentioned, to be laid before Parliament, previous to receiving His Majesty's assent, etc.

vision contained in the said Act passed in the fourteenth year of the reign of His present Majesty; or to vary or repeal the above recited provision contained in His Majesty's royal instructions, given on the third day of January, in the year of our Lord 1775, to the said Guy Carleton, Esquire, now Lord Dorchester; or to vary or repeal the provisions hereinbefore contained for continuing the force and effect of the said declaration and provisions; or to vary or repeal any of the several provisions hereinbefore contained, respecting the allotment and appropriation of lands for the support of a Protestant clergy within the said Provinces; or respecting the constituting, erecting, or endowing parsonages or rectories within the said Provinces; or respecting the presentation of incumbents or ministers to the same; or respecting the manner in which such incumbents or ministers shall hold and enjoy the same; and also, that whenever any Act or Acts shall be so passed, containing any provisions which shall in any manner relate to or affect the enjoyment or exercise of any religious form or mode of worship; or shall impose or create any penalties, burthens, disabilities, or disqualifications in respect of the same; or shall in any manner relate to or affect the payment, recovery, or enjoyment of any of the accustomed dues or rights hereinbefore mentioned; or shall in any manner relate to the granting, imposing, or recovering any other dues, or stipends, or emoluments whatever, to be paid to or for the use of any minister, priest, ecclesiastic, or teacher, according to any religious form or mode of worship, in respect of his said office or function; or shall in any manner relate to or affect the establishment or discipline of the Church of England, amongst the ministers and members thereof within the said Provinces; or shall in any manner relate to or affect the King's prerogative touching the granting the waste lands of the Crown within the said Provinces; every such Act or Acts shall, previous to any declaration or signification of the King's assent thereto, be laid before both Houses of Parliament in Great Britain; and that it shall not be lawful for His Majesty, his heirs or successors, to signify his or their assent to any such Act or Acts, until thirty days after the same shall have been laid before the said Houses, or to assent to any such Act or Acts in case either House of Parliament shall, within the said thirty days, address His Majesty, his heirs or successors, to withhold his or their assent from

such Act or Acts; and that no such Act shall be valid or effectual to any of the said purposes within either of the said Provinces, unless the Legislative Council and Assembly of such Provinces shall, in the session in which the same shall have been passed by them, have presented to the Governor, Lieutenant-Governor, or person administering the Government of such Province, an address or addresses, specifying that such Act contains provisions for some of the said purposes hereinbefore specially described, and desiring that, in order to give effect to the same, such Act should be transmited to England without delay for the purpose of being laid before Parliament previous to the signification of His Majesty's assent thereto.

Lands in Upper Canada to be granted in free and common soccage, and also in Lower Canada, if desired.

43. And be it further enacted by the authority aforesaid, That all lands which shall be hereafter granted within the said Province of Upper Canada shall be granted in free and common soccage, in like manner as lands are now holden in free and common soccage, in that part of Great Britain called England; and that in every case where lands shall be hereafter granted within the said Province of Lower Canada, and where the grantee thereof shall desire the same to be granted in free and common soccage, the same shall be so granted; but subject nevertheless to such alterations, with respect to the nature and consequences of such tenure of free and common soccage, as may be established by any law or laws which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of the Province.

Persons holding lands in Upper Canada may have fresh grants.

44. And be it further enacted by the authority aforesaid, That if any person or persons holding any lands in the said Province of Upper Canada, by virtue of any certificate of occupation derived under the authority of the Governor and Council of the Province of Quebec, and having power and authority to alienate the same, shall at any time, from and after the commencement of this Act, surrender the same into the hands of His Majesty, his heirs or successors, by petition to the Governor or Lieutenant-Governor, or person administering the Government of the said Province, setting forth that he, she, or they is or are desirous of holding the same in free and common soccage, such Governor or Lieutenant-Governor or person administering the Government, shall thereupon cause a fresh grant to be made to such person or persons of such lands, to be holden in free and common soccage.

Such fresh grants not to bar any right or title to the lands.

45. Provided nevertheless, and be it further enacted by the authority aforesaid, That such surrender and grant shall not avoid or bar any right or title to any such lands so surrendered, or any interest in the same, to which any person or persons other than the person or persons surrendering the same, shall have been entitled, either in possession, remainder, or reversion, or otherwise, at the time of such surrender; but that every such surrender and grant shall be made subject to every such right, title, and interest, and that every such right, title, or interest shall be as valid and effectual as if such surrender and grant had never been made.

18 Geo. 3. c. 12. recited.

46. And whereas by an Act passed in the eighteenth year of the reign of His present Majesty, intituled, "An Act for removing all doubts and apprehensions concerning taxation by the Parliament of Great Britain, in any of the Colonies, Provinces, and plantations in North America, and the West Indies: and for repealing so much of an Act made in the seventh year of the reign of His present Majesty, as imposes a duty on tea imported from Great Britain into any colony or plantation in America, or relates thereto," it has been declared, "That the King and Parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of His Majesty's Colonies, Provinces, and plantations in North America or the West Indies, except only such duties as it may be expedient to impose for the regulation of commerce, the net produce of such duties to be always paid and applied to and for the use of the Colony, Province, or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective General Courts or General Assemblies of such Colonies, Provinces, or plantations, are ordinarily paid and applied:" and whereas it is necessary, for the general benefit of the British Empire, that such power of regulation of commerce should continue to be exercised by His Majesty, his heirs or successors, and the Parliament of Great Britain, subject nevertheless to the condition hereinbefore recited, with respect to the application of any duties which may be imposed for that purpose: be it therefore enacted by the authority aforesaid, That nothing in this Act contained shall extend, or be construed to extend, to prevent or affect the execution of any law which hath been or shall at any time be made by His Majesty, his heirs or successors, and the Parliament of Great Britain, for establishing regula-

This Act not to prevent the operation of any Act of Parliament, establishing prohibitions

tions or prohibitions, or for imposing, levying, or collecting duties for the regulation of navigation, or for the regulation of the commerce to be carried on between the said two Provinces, or between either of the said Provinces and any other part of His Majesty's dominions, or between either of the said Provinces and any foreign country or state, or for appointing and directing the payment of drawbacks of such duties so imposed, or to give to His Majesty, his heirs or successors, any power or authority, by and with the advice and consent of such Legislative Councils and Assemblies respectively, to vary or repeal any such law or laws, or any part thereof, or in any manner to prevent or obstruct the execution thereof.

or imposing duties for the regulation of navigation and commerce, etc.

47. Provided always, and be it enacted by the authority aforesaid, That the net produce of all duties which shall be so imposed shall at all times hereafter be applied to and for the use of each of the said Provinces respectively, and in such manner only as shall be directed by any law or laws which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of such Province.

Such duties to be applied to the use of the respective Provinces.

[*Temporary provisions.*]

48. And whereas, by reason of the distance of the said Provinces from this country, and of the change to be made by this Act in the Government thereof, it may be necessary that there should be some interval of time between the notification of this Act to the said Provinces respectively, and the day of its commencement within the said Provinces respectively: be it therefore enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, with the advice of his Privy Council, to fix and declare, or to authorise the Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the Government there, to fix and declare the day of the commencement of this Act, within the said Provinces respectively, provided that such day shall not be later than the thirty-first day of December in the year of our Lord one thousand seven hundred and ninety-one.

His Majesty in Council to fix and declare the commencement of this Act, etc.

49. And be it further enacted by the authority aforesaid, that the time to be fixed by His Majesty, his heirs or successors, or under his or their authority, by the Governor, Lieutenant-Governor, or person administering

Time for issuing the writs of summons and election, etc, not to be

later than Dec. 31, 1792.

the Government in each of the said Provinces respectively, for issuing the writs of summons and election, and calling together the Legislative Councils and Assemblies of each of the said Provinces respectively, shall not be later than the thirty-first day of December in the year of our Lord one thousand seven hundred and ninety-two.

Between the commencement of this Act and the first meeting of the Legislative Council and Assembly, temporary laws may be made.

50. Provided always, and be it further enacted by the authority aforesaid, That during such interval as may happen between the commencement of this Act, within the said Provinces respectively, and the first meeting of the Legislative Council and Assembly of each of the said Provinces respectively, it shall and may be lawful for the Governor or Lieutenant-Governor of such Province, or for the person administering the Government therein, with the consent of the major part of such Executive Council as shall be appointed by His Majesty for the affairs of such Province, to make temporary laws and ordinances for the good government, peace, and welfare of such Province, in the same manner, and under the same restrictions, as such laws or ordinances might have been made by the Council for the affairs of the Province of Quebec, constituted by virtue of the above mentioned Act of the fourteenth year of the reign of His present Majesty; and that such temporary laws or ordinances shall be valid and binding within such Province, until the expiration of six months after the Legislative Council and Assembly of such Province shall have been first assembled by virtue of and under the authority of this Act; subject, nevertheless, to be sooner repealed or varied by any law or laws which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the said Legislative Council and Assembly.

IMP. ACT 3 & 4 VICT. CAP. 35—1840.

AN ACT TO RE-UNITE THE PROVINCES OF UPPER AND LOWER CANADA, AND FOR THE GOVERNMENT OF CANADA.

Whereas it is necessary that provision be made for the good government of the Provinces of Upper Canada and Lower Canada in such manner as may secure the rights and liberties and promote the interests of all classes of Her Majesty's subjects within the same; and whereas to this end it is expedient that the said Provinces be re-united and form one Province for the purposes of executive government and legislation: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for Her Majesty, with the advice of Her Privy Council, to declare, or to authorize the Governor-General of the said two Provinces of Upper and Lower Canada to declare by proclamation, that the said Provinces, upon, from, and after a certain day in such proclamation to be appointed, which day shall be within fifteen calendar months next after the passing of this Act, shall form and be one Province, under the name of the Province of Canada, and thenceforth the said Provinces shall constitute and be one Province under the name aforesaid, upon, from, and after the day so appointed as aforesaid. Declaration of union.

2. And be it enacted, That so much of an Act passed in the session of Parliament held in the thirty-first year of the reign of King George the Third, intituled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, intituled 'An Act for making more effectual provision for the government of the Province of Quebec in North America,' and to make further provision for the government of the said Province," as provides for constituting and composing a Legislative Council and Assembly within each of the said Provinces respectively, and for the making of laws; and also the whole of an Act passed in the session of Parliament, held in the first and second years of the reign of her present Majesty, intituled "An Act to make temporary provision for the Government of Lower Canada;" and also the Repeal of Acts, 31 Geo. III. c. 31. 1 & 2 Vict. c. 9. 2 & 3 Vict. c. 53.

whole of an Act passed in the session of Parliament held in the second and third years of the reign of her present Majesty, intituled "An Act to amend an Act of the last session of Parliament for making temporary provision for the government of Lower Canada;" and also the whole of an Act passed in the session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, intituled "An Act to amend an Act of the fourteenth year of His Majesty King George the Third, for establishing a fund towards defraying the charges of the administration of justice and the support of civil government in the Province of Quebec in America," shall continue and remain in force until the day on which it shall be declared, by proclamation as aforesaid, that the two said Provinces shall constitute and be one Province as aforesaid, and shall be repealed on, from, and after such day: Provided always, that the repeal of the said several Acts of Parliament, and parts of Acts of Parliament, shall not be held to revive or give any force or effect to any enactment which has by the said Acts, or any of them, been repealed or determined.

1 & 2 Wm. IV., c. 23.

14 Geo. III. c. 88.

Composition and power of Legislature.

3. And be it enacted, That from and after the re-union of the said two Provinces, there shall be within the Province of Canada one Legislative Council and one Assembly, to be severally constituted and composed in the manner hereinafter prescribed, which shall be called "The Legislative Council and Assembly of Canada;" and that, within the Province of Canada, Her Majesty shall have power, by and with the advice and consent of the said Legislative Council and Assembly, to make laws for the peace, welfare, and good government of the Province of Canada, such laws not being repugnant to this Act, or to such parts of the said Act passed in the thirty-first year of the reign of His said late Majesty, as are not hereby repealed, or to any Act of Parliament made or to be made, and not hereby repealed, which does or shall, by express enactment or by necessary intendment, extend to the Provinces of Upper and Lower Canada, or to either of them, or to the Province of Canada; and that all such laws being passed by the said Legislative Council and Assembly, and assented to by Her Majesty, or assented to in Her Majesty's name, by the Governor of the Province of Canada, shall be valid and binding to all intents and purposes within the Province of Canada.

Appointment of Legislative Councillors.

4. And be it enacted, That for the purpose of composing the Legislative Council of the Province of Canada, it shall be lawful for Her Majesty, before the time to be appointed for the first meeting of the said Legislative Council and Assembly, by an instrument under the sign manual, to authorize the Governor in Her Majesty's name, by an instrument under the great seal of the said Province, to summon to the said Legislative Council of the said Province, such persons being not fewer than twenty, as Her Majesty shall think fit; and that it shall also be lawful for Her Majesty from time to time, to authorize the Governor in like manner to summon to the said Legislative Council such other person or persons as Her Majesty shall think fit, and that every person who shall be so summoned shall thereby become a member of the Legislative Council of the Province of Canada: Provided always, that no person shall be summoned to the said Legislative Council of the Province of Canada who shall not be of the full age of twenty-one years, and a natural born subject of Her Majesty, or a subject of Her Majesty naturalized by Act of the Parliament of Great Britain, or by Act of the Parliament of the United Kingdom of Great Britain and Ireland, or by an Act of the Legislature of either of the Provinces of Upper or Lower Canada, or by an Act of the Legislature of the Province of Canada.

Qualification of Legislative Councillors.

Tenure of office of Councillor.

5. And be it enacted, That every member of the Legislative Council of the Province of Canada shall hold his seat therein for the term of his life, but subject nevertheless to the provisions hereinafter contained for vacating the same.

Resignation of Legislative Councillors.

6. And be it enacted, That it shall be lawful for any member of the Legislative Council of the Province of Canada to resign his seat in the said Legislative Council, and upon such resignation the seat of such Legislative Councillor shall become vacant.

Vacating seat by absence.

7. And be it enacted, That if any legislative councillor of the Province of Canada shall, for two successive sessions of the Legislature of the said Province, fail to give his attendance in the said Legislative Council without the permission of Her Majesty or of the Governor of the said Province, signified by the said Governor to the Legislative Council, or shall take any oath or make any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign Prince or Power, or shall do,

concur in or adopt any act whereby he may become a subject or citizen of any foreign State or Power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power, or shall become bankrupt, or take the benefit of any law relating to insolvent debtors, or become a public defaulter, or be attainted of treason, or be convicted of felony, or of any infamous crime, his seat in such Council shall thereby become vacant.

Trial of questions.

8. And be it enacted, That any question which shall arise respecting any vacancy in the Legislative Council of the Province of Canada on occasion of any of the matters aforesaid, shall be referred by the Governor of the Province of Canada to the said Legislative Council, to be, by the said Legislative Council, heard and determined: Provided always, that it shall be lawful, either for the person respecting whose seat such question shall have arisen, or for Her Majesty's Attorney-General for the said Province, on Her Majesty's behalf, to appeal from the determination of the said Council in such case to Her Majesty, and that the judgment of Her Majesty, given with the advice of her Privy Council thereon, shall be final and conclusive to all intents and purposes.

Appointment of Speaker.

9. And be it enacted, That the Governor of the Province of Canada shall have power and authority from time to time, by an instrument under the Great Seal of the said Province, to appoint one member of the said Legislative Council to be Speaker of the said Legislative Council, and to remove him, and appoint another in his stead.

Quorum division.

10. And be it enacted, That the presence of at least ten members of the said Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers; and that all questions which shall arise in the said Legislative Council shall be decided by a majority of voices of the members present other than the Speaker, and when the voices shall be equal the Speaker shall have the casting vote.

Casting vote.

Convoking the Assembly.

11 And be it enacted, That for the purpose of constituting the Legislative Assembly of the Province of Canada it shall be lawful for the Governor of the said Province within the time hereinafter mentioned, and thereafter from time to time, as occasion shall require, in Her Majesty's name and by an instrument or instruments under the Great Seal of the said Province, to sum-

mon and call together a Legislative Assembly in and for the said Province.

Representatives for each Province.

12. And be it enacted, That in the Legislative Assembly of the Province of Canada to be constituted as aforesaid, the parts of the said Province which now constitute the Provinces of Upper and Lower Canada respectively, shall, subject to the provisions hereinafter contained, be represented by an equal number of representatives, to be elected for the places and in the manner hereinafter mentioned.

County of Halton.

13. And be it enacted, That the County of Halton, in the Province of Upper Canada, shall be divided into two ridings, to be called respectively the East Riding and the West Riding; and that the East Riding of the said County shall consist of the following Townships, namely, Trafalgar, Nelson, Esquesing, Nassagaweya, East Flamborough, West Flamborough, Erin, Beverley; and that the West Riding of the said County shall consist of the following townships, namely, Garafraxa, Nichol, Woolwich, Guelph, Waterloo, Wilmot, Dumfries, Puslinch, Eramosa; and that the East Riding and West Riding of the said County shall each be represented by one member in the Legislative Assembly of the Province of Canada.

County of Northumberland.

14. And be it enacted, That the County of Northumberland, in the Province of Upper Canada, shall be divided into two ridings, to be called respectively the North Riding and the South Riding; and that the North Riding of the last mentioned County shall consist of the following Townships, namely, Monaghan, Otonabee, Asphodel, Smith, Douro, Dummer, Belmont, Methuen, Burleigh, Harvey, Emily, Gore, Ennismore; and that the South Riding of the last mentioned County shall consist of the following Townships, namely, Hamilton, Haldimand, Cramahe, Murray, Seymour, Percy; and that the North Riding and South Riding of the last mentioned County shall each be represented by one member in the Legislative Assembly of the Province of Canada.

County of Lincoln.

15. And be it enacted, That the County of Lincoln, in the Province of Upper Canada, shall be divided into two ridings, to be called respectively the North Riding and the South Riding; and that the North Riding shall be formed by uniting the First Riding and Second Riding of the said County, and the South Riding by uniting the Third Riding and Fourth Riding of the said County; and that the North and South Riding of the last mentioned

County shall each be represented by one member in the Legislative Assembly of the Province of Canada.

Other county constituencies of Upper Canada.

16. And be it enacted, That every county and riding, other than those hereinbefore specified, which at the time of the passing of this Act was by law entitled to be represented in the Assembly of the Province of Upper Canada, shall be represented by one member in the Legislative Assembly of the Province of Canada.

Town constituency of Upper Canada.

17. And be it enacted, That the City of Toronto shall be represented by two members, and the Towns of Kingston, Brockville, Hamilton, Cornwall, Niagara, London, and Bytown, shall each be represented by one member in the Legislative Assembly of the Province of Canada.

County constituency of LowerCanada.

1 & 2 Vict. c. 9.

18. And be it enacted, That every county, which before and at the time of the passing of the said Act of Parliament, intituled "An Act to make temporary provision for the government of Lower Canada," was entitled to be represented in the Assembly of the Province of Lower Canada, except the Counties of Montmorency, Orleans, L'Assomption, La Chesnaye, L'Acadie, Laprairie, Dorchester and Beauce, hereinafter mentioned, shall be represented by one member in the Legislative Assembly of the Province of Canada.

Further provision as to constituency of LowerCanada.

19. And be it enacted, That the said Counties of Montmorency and Orleans shall be united into and form one county, to be called the County of Montmorency; and that the said Counties of L'Assomption and La Chesnaye shall be united into and form one county to be called the County of Leinster; and that the said Counties of L'Acadie and Laprairie shall be united into and form one county, to be called the County of Huntingdon; and that the Counties of Dorchester and Beauce shall be united into and form one county, to be called the County of Dorchester; and that each of the said Counties of Montmorency, Leinster, Huntingdon and Dorchester, shall be represented by one member in the Legislative Assembly of the said Province of Canada.

Town constituency of Lower Canada.

20. And be it enacted, That the Cities of Quebec and Montreal shall each be represented by two members, and the Towns of Three Rivers and Sherbrooke shall each be represented by one member in the Legislative Assembly of the Province of Canada.

Boundaries of cities and towns to be settled by Governor.

21. And be it enacted, That for the purpose of electing their several representatives to the said Legislative Assembly, the cities and towns hereinbefore mentioned

shall be deemed to be bounded and limited in such manner as the Governor of the Province of Canada by Letters Patent under the Great Seal of the Province, to be issued within thirty days after the union of the said Provinces of Upper Canada and Lower Canada, shall set forth and describe; and such parts of any such city or town (if any) which shall not be included within the boundary of such city or town respectively, by such Letters Patent, for the purposes of this Act shall be taken to be a part of the adjoining county or riding, for the purpose of being represented in the said Legislative Assembly.

Returning Officers.

22. And be it enacted, That for the purpose of electing the members of the Legislative Assembly of the Province of Canada, it shall be lawful for the Governor of the said Province from time to time, to nominate proper persons to execute the office of returning officer, in each of the counties, ridings, cities and towns which shall be represented in the Legislative Assembly of the Province of Canada, subject nevertheless to the provisions hereinafter contained.

Term of office of Returning Officer.

23. And be it enacted, That no person shall be obliged to execute the said office of returning officer, for any longer term than one year, or oftener than once, unless it shall be at any time otherwise provided by some Act or Acts of the Legislature of the Province of Canada.

Writs of election.

24. And be it enacted, That writs for the election of members to serve in the Legislative Assembly of the Province of Canada shall be issued by the Governor of the said Province within fourteen days after the sealing of such instrument as aforesaid, for summoning and calling together such Legislative Assembly; and that such writs shall be directed to the returning officers of the said counties, ridings, cities and towns respectively; and that such writs shall be made returnable within fifty days at farthest from the day on which they shall bear date, unless it shall at any time be otherwise provided by any Act of the Legislature of the said Province, and that writs shall in like manner and form be issued for the election of members in the case of any vacancy which shall happen by the death or resignation of the person chosen, or by his being summoned to the Legislative Council of the said Province, or from any other legal cause; and that such writs shall be made returnable within fifty days at farthest from the day on which they

shall bear date, unless it shall be at any time otherwise provided by any Act of the Legislature of the said Province; and that in any case of any such vacancy which shall happen by the death of the person chosen, or by reason of his being so summoned as aforesaid, the writ for the election of a new member shall be issued within six days after notice thereof shall have been delivered to or left at the office of the proper officer for issuing such writs of election.

Time and place of holding elections.

25. And be it enacted, That it shall be lawful for the Governor of the Province of Canada for the time being, to fix the time and place of holding elections of members to serve in the Legislative Assembly of the said Province, until otherwise provided for as hereinafter is mentioned, giving not less than eight days notice of such time and place.

Power to alter system of representation.

26. And be it enacted, That it shall be lawful for the Legislature of the Province of Canada, by any Act or Acts to be hereafter passed, to alter the divisions and extent of the several counties, ridings, cities and towns, which shall be represented in the Legislative Assembly of the Province of Canada, and to establish new and other divisions of the same, and to alter the apportionment of representatives to be chosen by the said counties, ridings, cities and towns respectively, and make a new and different apportionment of the number of representatives to be chosen in and for those parts of the Province of Canada which now constitute the said Provinces of Upper and Lower Canada respectively, and in and for the several districts, counties, ridings and towns in the same, and to alter and regulate the appointment of returning officers in and for the same, and make provision, in such manner as they may deem expedient for the issuing and return of writs for the election of members to serve in the said Legislative Assembly and the time and place of holding such elections:

Proviso.

Repealed by Imp. Act, 17 & 18 V. c. 118, s. 5.

Provided always, that it shall not be lawful to present to the Governor of the Province of Canada for Her Majesty's assent, any Bill of the Legislative Council and Assembly of the said Province by which the number of representatives in the Legislative Assembly may be altered, unless the second and third reading of such Bill in the Legislative Council and the Legislative Assembly shall have been passed with the concurrence of two-thirds of the members for the time

being of the said Legislative Council, and of two-thirds of the members for the time being, of the said Legislative Assembly respectively, and the assent of Her Majesty shall not be given to any such Bill unless addresses shall have been presented by the Legislative Council, and the Legislative Assembly respectively, to the Governor, stating that such Bill has been so passed.

The present election laws of the two Provinces to apply until altered.

27. And be it enacted, That until provisions shall otherwise be made by an Act or Acts of the Legislature of the Province of Canada, all the laws which at the time of the passing of this Act are in force in the Province of Upper Canada, and all the laws which at the time of the passing of the said Act of Parliament, intituled, "An Act to make temporary provision for the Government of Lower Canada," were in force in the Province of Lower Canada, relating to the qualification and disqualification of any person to be elected, or to sit or vote as a member of the Assembly in the said provinces respectively, (except those which require a qualification of property in candidates for election, for which provision is hereinafter made), and relating to the qualification and disqualification of voters at the election of members to serve in the assemblies of the said Provinces respectively, and to the oaths to be taken by any such voters, and to the powers and duties of Returning Officers, and the proceedings at such elections and the period during which such elections may be lawfully continued, and relating to the trial of controverted elections and the proceedings incident thereto, and to the vacating of seats of members and the issuing and execution of new writs in case of any seat being vacated otherwise than by a dissolution of the Assembly, shall respectively be applied to elections of members, to serve in the Legislative Assembly of the Province of Canada for places situated in those parts of the Province of Canada for which such laws were passed.

1 & 2 Vict. c. 9.

Qualification of members.

28. And be it enacted, That no person shall be capable of being elected a member of the Legislative Assembly of the Province of Canada, who shall not be legally or equitably seised as of freehold, for his own use and benefit, of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit, of lands or tenements held in Fief or in Roture, within the said Province of Canada, of the value of five hundred pounds of sterling money of Great Britain, over and above all rents, charges, mortgages and incum-

brances charged upon, and due and payable out of or affecting the same; and that every candidate at such election, before he shall be capable of being elected, shall, if required by any other candidate, or by any elector, or by the returning officer, make the following declaration:

Declaration of candidates for election.

"I, A. B., do declare and testify, That I am duly seised at law or in equity as of freehold, for my own use and benefit, of lands or tenements held in free and common socage, (or duly seised or possessed for my own use and benefit of lands or tenements held in Fief or in Roture (*as the case may be*),) in the Province of Canada, of the value of five hundred pounds of sterling money of Great Britain, over and above all rents, mortgages, charges, and incumbrances charged upon or due and payable out of or affecting the same; and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements, or any part thereof, for the purpose of qualifying or enabling me to be returned a member of the Legislative Assembly of the Province of Canada."

Persons making false declaration liable to the penalties of perjury.

29. And be it enacted, That if any person shall knowingly and wilfully make a false declaration respecting his qualification as a candidate at any election as aforesaid, such person shall be deemed to be guilty of a misdemeanor, and being thereof lawfully convicted, shall suffer the like pains and penalties as by law are incurred by persons guilty of wilful and corrupt perjury in the place in which such false declaration shall have been made.

Place and times of holding Parliament.

30. And be it enacted, That it shall be lawful for the Governor of the Province of Canada for the time being to fix such place or places within any part of the Province of Canada, and such times for holding the first and every other session of the Legislative Council and Assembly of the said Province as he may think fit, such times and places to be afterwards changed or varied, as the Governor may judge advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof; and also to prorogue the said Legislative Council and Assembly from time to time, and dissolve the same by proclamation or otherwise, whenever he shall deem it expedient.

Duration of Parliament.

31. And be it enacted, That there shall be a session of the Legislative Council and Assembly of the Province of

Canada once at least in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the Legislative Council and Assembly in one session and the first sitting of the Legislative Council and Assembly in the next session, and that every Legislative Assembly of the said Province hereafter to be summoned and chosen, shall continue for four years from the day of the return of the writs for choosing the same, and no longer, subject nevertheless to be sooner prorogued or dissolved by the Governor of the said Province.

First calling together of the Legislature.

32. And be it enacted, That the Legislative Council and Assembly of the Province of Canada shall be called together for the first time at some period not later than six calendar months after the time at which the Provinces of Upper and Lower Canada shall become reunited as aforesaid.

Election of the Speaker.

33. And be it enacted, That the members of the Legislative Assembly of the Province of Canada shall, upon the first assembling after every general election, proceed forthwith to elect one of their number to be Speaker; and in case of his death, resignation, or removal by a vote of the said Legislative Assembly, the said members shall forthwith proceed to elect another of such members to be such Speaker; and the Speaker so elected shall preside at all meetings of the said Legislative Assembly.

Quorum.

34. And be it enacted, That the presence of at least twenty members of the Legislative Assembly of the Province of Canada, including the Speaker, shall be necessary to constitute a meeting of the said Legislative Assembly for the exercise of its powers; and that all questions which shall arise in the said Assembly shall be decided by the majority of voices of such members as shall be present, other than the Speaker, and when the voices shall be equal the Speaker shall have the casting voice.

Division.

Casting vote.

No member to sit and vote until he has taken the following oath of allegiance.

35. And be it enacted, That no member, either of the Legislative Council or of the Legislative Assembly of the Province of Canada, shall be permitted to sit or vote therein until he shall have taken and subscribed the following oath before the Governor of the said Province, or before some person or persons authorized by such Governor to administer such oath:

Oath of allegiance.

"I, A. B., do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, as lawful Sovereign of the United Kingdom of

Great Britain and Ireland and of this Province of Canada, dependent on and belonging to the said United Kingdom; and that I will defend her to the utmost of my power against all traitorous conspiracies and attempts whatever which shall be made against Her Person, Crown and Dignity; and that I will do my utmost endeavour to disclose and make known to Her Majesty, her heirs and successors, all treasons and traitorous conspiracies and attempts which I shall know to be against her or any of them; and all this I do swear without any equivocation, mental evasion or secret reservation, and renouncing all pardons and dispensations from any person or persons whatever to the contrary. So help me God."

Affirmation instead of oath.

36. And be it enacted, That every person authorized by law to make an affirmation, instead of taking an oath may make such affirmation in every case in which an oath is hereinbefore required to be taken.

Giving or withholding assent to Bills.

37. And be it enacted, That whenever any Bill which has been passed by the Legislative Council and Assembly of the Province of Canada shall be presented for Her Majesty's assent to the Governor of the said Province, such Governor shall declare, according to his discretion, but subject nevertheless to the provisions contained in this Act, and to such instructions as may from time to time be given in that behalf by Her Majesty, her heirs or successors, that he assents to such Bill in Her Majesty's name or that he withholds Her Majesty's assent, or that he reserves such Bill for the signification of Her Majesty's pleasure thereon.

Disallowance of Bills assented to.

38. And be it enacted, That whenever any Bill which shall have been presented for Her Majesty's assent to the Governor of the said Province of Canada shall by such Governor have been assented to in Her Majesty's name, such Governor shall, by the first convenient opportunity, transmit to one of Her Majesty's principal Secretaries of State an authentic copy of such Bill so assented to; and that it shall be lawful at any time within two years after such Bill shall have been so received by such Secretary of State, for Her Majesty, by Order in Council, to declare her disallowance of such Bill; and that such disallowance, together with a certificate under the hand and seal of such Secretary of State, certifying the day on which such Bill was received as aforesaid, being signified by such Governor to the Legislative Council and Assembly of Canada, by Speech or Message to the

Legislative Council and Assembly of the said Province, or by proclamation, shall make void and annul the same from and after the day of such signification.

Assent to Bills reserved.

39. And be it enacted, That no Bill which shall be reserved for the signification of Her Majesty's pleasure thereon shall have any force or authority within the Province of Canada until the Governor of the said Province shall signify, either by Speech or Message to the Legislative Council and Assembly of the said Province, or by Proclamation, that such Bill has been laid before Her Majesty in Council and that Her Majesty has been pleased to assent to the same; and that an entry shall be made in the Journals of the said Legislative Council of every such Speech, Message, or Proclamation, and a duplicate thereof, duly attested, shall be delivered to the proper officer, to be kept among the Records of the said Province; and that no Bill which shall be so reserved, as aforesaid, shall have any force or authority in the said Province, unless Her Majesty's assent thereto shall have been so signified, as aforesaid, within the space of two years from the day on which such Bill shall have been presented for Her Majesty's assent to the Governor, as aforesaid.

Authority of the Governor.

40. Provided always, and be it enacted, That nothing herein contained shall be construed to limit or restrain the exercise of Her Majesty's prerogative in authorizing, and that notwithstanding this Act, and any other Act or Acts passed in the Parliament of Great Britain, or in the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of the Province of Quebec, or of the Provinces of Upper or Lower Canada respectively, it shall be lawful for Her Majesty to authorize the Lieutenant-Governor of the Province of Canada to exercise and execute, within such parts of the said Province as Her Majesty shall think fit, notwithstanding the presence of the Governor within the Province, such of the powers, functions, and authority, as well judicial as other, which before and at the time of passing of this Act were and are vested in the Governor, Lieutenant-Governor, or person administering the Government of the Provinces of Upper Canada and Lower Canada respectively, or of either of them, and which from and after the said re-union of the said two Provinces shall become vested in the Governor of the Province of Canada; and to authorize the Governor of the Province of Canada to assign, depute,

substitute, and appoint any person or persons, jointly or severally, to be his deputy or deputies within any part or parts of the Province of Canada, and in that capacity to exercise, perform, and execute during the pleasure of the said Governor such of the powers, functions, and authorities, as well judicial as other, as before and at the time of the passing of this Act were and are vested in the Governor, Lieutenant-Governor, or person administering the Government of the Provinces of Upper and Lower Canada respectively, and which, from and after the union of the said Provinces, shall become vested in the Governor of the Province of Canada, as the Governor of the Province of Canada shall deem to be necessary or expedient: Provided always, that by the appointment of a deputy or deputies, as aforesaid, the power and authority of the Governor of the Province of Canada shall not be abridged, altered, or in any way affected otherwise than as Her Majesty shall think proper to direct.

Language of Legislative Records.

Repealed by Imp. Act, 11 & 12 V. c. 56, s. 1.

41. And be it enacted, That from and after the said reunion of the said two Provinces, all writs, proclamations, instruments for summoning and calling together the Legislative Council and Legislative Assembly of the Province of Canada, and for proroguing and dissolving the same, and all writs of summons and election, and all writs and public instruments whatsoever, relating to the said Legislative Council and Legislative Assembly, or either of them, and all returns to such writs and instruments, and all journals, entries, and written or printed proceedings of what nature soever, of the said Legislative Council and Legislative Assembly, and of each of them respectively, and all written or printed proceedings and reports of committees of the said Legislative Council and Legislative Assembly respectively, shall be in the English language only: Provided always, that this enactment shall not be construed to prevent translated copies of any such documents being made, but no such copy shall be kept among the records of the Legislative Council or Legislative Assembly, or be deemed in any case to have the force of an original record.

Ecclesiastical and Crown rights, 14 G. III. c. 83.

Repealed by Imp. Act, 17 & 18 V. c. 118, s. 6.

42. And be it enacted, That whenever any Bill or Bills shall be passed by the Legislative Council and Assembly of the Province of Canada, containing any provisions to vary or repeal any of the provisions now in force, contained in an Act of the Parliament of Great Britain, passed in the fourteenth year of the reign of His late

Majesty King George the Third, intituled "An Act for making more effectual provision for the government of the Province of Quebec in North America," or in the aforesaid Acts of Parliament, passed in the thirty-first year of the same reign, respecting the accustomed dues and rights of the clergy of the Church of Rome; or to vary or repeal any of the several provisions contained in the said last mentioned Act, respecting the allotment and appropriation of lands for the support of the Protestant clergy within the Province of Canada, or respecting the constituting, erecting or endowing of parsonages or rectories within the Province of Canada, or respecting the presentation of incumbents or ministers of the same, or respecting the tenure on which such incumbents or ministers shall hold or enjoy the same; and also that whenever any Bill or Bills shall be passed containing any provisions which shall in any manner relate to or affect the enjoyment or exercise of any form or mode of religious worship, or shall impose or create any penalties, burdens, disabilities, or disqualifications in respect of the same, or shall in any manner relate to or affect the payment, recovery, or enjoyment of any of the accustomed dues or rights hereinbefore mentioned, or shall in any manner relate to the granting, imposing, or recovering of any other dues, or stipends, or emoluments to be paid to or for the use of any minister, priest, ecclesiastic, or teacher, according to any form or mode of religious worship, in respect of his said office or function; or shall in any manner relate to or affect the establishment or discipline of the United Church of England and Ireland among the members thereof within the said Province, or shall in any manner relate to or affect Her Majesty's prerogative touching the granting of waste lands of the Crown within the said Province: every such Bill or Bills shall, previously to any declaration or signification of Her Majesty's assent thereto, be laid before both Houses of Parliament of the United Kingdom of Great Britain and Ireland; and that it shall not be lawful for Her Majesty to signify her assent to any such Bill or Bills until thirty days after the same shall have been laid before the said Houses, or to assent to any such Bill or Bills in case either House of Parliament shall, within the said thirty days, address Her Majesty to withhold her assent from any such Bill or Bills; and that no such Bill shall be valid or effectual to any of the said purposes within

the said Province of Canada unless the Legislative Council and Assembly of such Province shall, in the session in which the same shall have been passed by them, have presented to the Governor of the said Province an address or addresses, specifying that such Bill or Bills contains provisions for some of the purposes hereinbefore specially described, and desiring that, in order to give effect to the same, such Bill or Bills may be transmitted to England without delay, for the purpose of its being laid before Parliament previously to the signification of Her Majesty's assent thereto.

Colonial taxation, 18 Geo. III., c. 12.

43. And whereas by an Act passed in the eighteenth year of the reign of his late Majesty King George the Third, intituled "An Act for removing all doubts and apprehensions concerning taxation by the Parliament of Great Britain in any of the Colonies, Provinces, and Plantations in North America and the West Indies; and for repealing so much of an Act made in the seventh year of the reign of his present Majesty, as imposes a duty on tea imported from Great Britain into any Colony or Plantation in America, or relating thereto," it was declared that "the King and Parliament of Great Britain would not impose any duty, tax, or assessment whatever, payable in any of His Majesty's Colonies, Provinces, and Plantations in North America or the West Indies, except only such duties as it might be expedient to impose for the regulation of commerce, the net produce of such duties to be always paid and applied to and for the use of the Colony, Province, or Plantation, in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective General Courts or General Assemblies of such Colonies, Provinces, or Plantations were ordinarily paid and applied:" And whereas it is necessary for the general benefit of the empire, that such power of regulation of commerce should continue to be exercised by His Majesty and the Parliament of the United Kingdom of Great Britain and Ireland, subject nevertheless to the conditions hereinbefore recited with respect to the application of any duties which may be imposed for that purpose; Be it therefore enacted, That nothing in this Act contained shall prevent or affect the execution of any law which hath been or shall be made in the Parliament of the said United Kingdom for establishing regulations and prohibitions, or for the imposing, levying, or collecting duties for the regulation

of navigation, or for the regulation of the commerce between the Province of Canada and any other part of Her Majesty's Dominions, or between the said Province of Canada, or any part thereof, and any foreign country or state, or for appointing and directing the payment of drawbacks of such duties so imposed, or to give to Her Majesty any power or authority, by and with the advice and consent of such Legislative Council and Assembly of the said Province of Canada, to vary or repeal any such law or laws, or any part thereof, or in any manner to prevent or obstruct the execution thereof: Provided always, that the net produce of all duties which shall be so imposed shall, at all times hereafter, be applied to and for the use of the said Province of Canada, and (except as hereinafter provided) in such manner only as shall be directed by any law or laws which may be made by Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of such Province.

Courts of Appeal, Probate, Queen's Bench and Chancery in Upper Canada; and Court of Appeal in Lower Canada.

44. And whereas by the laws now in force in the said Province of Upper Canada, the Governor, Lieutenant-Governor, or person administering the Government of the said Province, or the Chief-Justice of the said Province, together with any two or more of the members of the Executive Council of the said Province, constitute, and are a Court of Appeal for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them; and whereas by an Act of the Legislature of the said Province of Upper Canada, passed in the thirty-third year of the reign of His late Majesty King George the Third, intituled "An Act to establish a Court of Probate in the said Province, and also a Surrogate Court in every district thereof," there was and is established a Court of Probate in the said Province, in which Act it was enacted that the Governor, Lieutenant-Governor or person administering the Government of the said last mentioned Province should preside, and that he should have the powers and authorities in the said Act specified; and whereas, by an Act of the Legislature of the said Province of Upper Canada, passed in the second year of the reign of His late Majesty King William the Fourth, intituled "An Act respecting the time and place of sitting of the Court of King's Bench," it was among other things enacted, That His Majesty's Court of King's Bench in that Province should be holden in a place certain; that is, in the city, town or place which should be for the time

(Laws of Upper Canada, 33 G. 3, sess. 2, c. 8.)

(Laws of Upper Canada, 2 W. 4, c. 8.)

being the seat of the Civil Government of the said Province, or within one mile therefrom. And whereas by an Act of the Legislature of the said Province of Upper Canada, passed in the seventh year of the reign of his late Majesty King William the Fourth, intituled "An Act to establish a Court of Chancery in this Province," it was enacted that there should be constituted and established a Court of Chancery, to be called and known by the name and style of "The Court of Chancery for the Province of Upper Canada," of which Court the Governor, Lieutenant-Governor, or person administering the Government of the said Province, should be Chancellor; and which Court, it was also enacted, should be holden at the seat of Government in the said Province, or in such other place as should be appointed by proclamation of the Governor, Lieutenant-Governor, or person administering the Government of the said Province; and whereas by an Act of the Legislature of the Province of Lower Canada, passed in the thirty-fourth year of the reign of his late Majesty King George the Third, intituled "An Act for the Division of the Province of Lower Canada, for amending the Judicature thereof, and for repealing certain laws therein mentioned," it was enacted that the Governor, Lieutenant-Governor, or the person administering the Government, the members of the Executive Council of the said Province, the Chief-Justice thereof, and the Chief-Justice to be appointed for the Court of King's Bench at Montreal, or any five of them, the Judges of the Court of the District wherein the judgement appealed from was given excepted, should constitute a Superior Court of Civil Jurisdiction, or Provincial Court of Appeals, and should take cognizance of, hear, try, and determine all causes, matters and things appealed from all Civil Jurisdictions and Courts, wherein an appeal is by law allowed: Be it enacted, That until otherwise provided by an Act of the Legislature of the Province of Canada, all judicial and ministerial authority which before and at the time of passing this Act was vested in or might be exercised by the Governor, Lieutenant-Governor, or person administering the Government of the said Province of Upper Canada, or the members or any number of the members of the Executive Council of the same Province, or was vested in, or might be exercised by the Governor, Lieutenant-Governor, or the person administering the Government of the Province of Lower Canada, and

(Laws of Upper Canada, 7 W. 4, c. 2.)

(Laws of Lower Canada, 34 G. 3.)

the members of the Executive Council of that Province, shall be vested in and may be exercised by the Governor, Lieutenant-Governor, or person administering the Government of the Province of Canada, and in the members or the like number of the members of the Executive Council of the Province of Canada respectively; and that until otherwise provided by Act or Acts of the Legislature of the Province of Canada, the said Court of King's Bench, now called the Court of Queen's Bench of Upper Canada, shall from and after the Union of the Provinces of Upper and Lower Canada, be holden at the City of Toronto, or within one mile from the municipal boundary of the said city of Toronto: Provided always, that, until otherwise provided by Act or Acts of the Legislature of the Province of Canada, it shall be lawful for the Governor of the Province of Canada, by and with the advice and consent of the Executive Council of the same Province, by his proclamation to fix and appoint such other place as he may think fit within that part of the last mentioned Province, which now constitutes the Province of Upper Canada for the holding of the said Court of Queen's Bench.

Powers to be exercised by Governor, with the Executive Council, or alone.

45. And be it enacted, That all powers, authorities, and functions which by the said Act passed in the thirty-first year of the reign of his late Majesty King George the Third, or by any other Act of Parliament, or by any Act of the Legislature of the Provinces of Upper and Lower Canada respectively, are vested in or are authorized or required to be exercised by the respective Governors or Lieutenant-Governors of the said Provinces, with the advice or with the advice and consent of the Executive Council of such Provinces respectively, or in conjunction with such Executive Council, or with any number of the members thereof, or by the said Governors or Lieutenant-Governors individually and alone, shall, in so far as the same are not repugnant to or inconsistent with the provision of this Act, be vested in and may be exercised by the Governor of the Province of Canada, with the advice or with the advice and consent of, or in conjunction, as the case may require, with such Executive Council or any members thereof, as may be appointed by Her Majesty for the affairs of the Province of Canada, or by the said Governor of the Province of Canada, individually and alone, in cases where the advice, consent, or concurrence of the Executive Council is not required.

Existing laws saved.

46. And be it enacted, That all laws, statutes, and ordinances, which at the time of the Union of the Provinces of Upper Canada and Lower Canada shall be in force within the said Provinces or either of them, or any part of the said Provinces respectively, shall remain and continue to be of the same force, authority and effect in those parts of the Province of Canada which now constitute the said Provinces respectively, as if this Act had not been made, and as if the said two Provinces had not been united as aforesaid, except in so far as the same are repealed or varied by this Act, or in so far as the same shall or may hereafter, by virtue and under the authority of this Act, be repealed or varied by any Act or Acts of the Legislature of the Province of Canada.

Courts of Justice, commissions, officers, etc.

47. And be it enacted, That all the Courts of civil and criminal jurisdiction within the Provinces of Upper and Lower Canada at the time of the union of the said Provinces, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, or ministerial, within the said Provinces respectively, except in so far as the same may be abolished, altered, or varied by or may be inconsistent with the provisions of this Act, or shall be abolished, altered, or varied by any Act or Acts of the Legislature of the Province of Canada, shall continue to subsist within those parts of the Province of Canada which now constitute the said two Provinces respectively, in the same form and with the same effect as if this Act had not been made, and as if the said two Provinces had not been reunited as aforesaid.

Provision respecting temporary Acts.

48. And whereas the Legislatures of the said Provinces of Upper and Lower Canada have from time to time passed enactments, which enactments were to continue in force for a certain number of years after the passing thereof, "and from thence to the end of the then next ensuing session of the Legislature of the Province in which the same were passed;" be it therefore enacted, That whenever the words "and from thence to the end of the then next ensuing session of the Legislature," or words to the same effect, have been used in any temporary Act of either of the said two Provinces which shall not have expired before the re-union of the said two Provinces, the said words shall be construed to extend and apply to the next session of the Legislature of the Province of Canada.

Repeal of part of 3 G. 4., c. 119.

49. And whereas, by a certain Act passed in the third year of the reign of his late Majesty King George the

Fourth, intituled an "Act to regulate the Trade of the Provinces of Lower and Upper Canada, and for other purposes relating to the said Provinces," certain provisions were made for appointing arbitrators, with power to hear and determine certain claims of the Province of Upper Canada upon the Province of Lower Canada, and to hear any claim which might be advanced on the part of the Province of Upper Canada to a proportion of certain duties therein mentioned, and for prescribing the course of proceeding to be pursued by such arbitrators; be it enacted, That the said recited provisions of the said last mentioned Act, and all matters in the same Act contained, which are consequent to or dependent upon the said provisions, or any of them, shall be repealed.

[*Sections 50 to 57, inclusive, with the schedules therein referred to, were repealed by Imp. Act, 10 & 11 V. c. 71; by which repeal the provisions substituted for them by the Prov. Act, 9 V. c. 114, were brought into force under section 9, of the said Provincial Act.*]

Revenues of the two Provinces to form a Consolidated Revenue Fund.

50. And be it enacted, That upon the union of the Provinces of Upper and Lower Canada, all duties and revenues over which the respective Legislatures of the said Provinces, before and at the time of the passing of this Act, had and have power of appropriation, shall form one consolidated revenue fund to be appropriated for the public service of the Province of Canada, in the manner and subject to the charges hereinafter mentioned.

Consolidated Revenue Fund to be charged with expense of collection, etc.

51. And be it enacted, That the said consolidated revenue fund of the Province of Canada shall be permanently charged with all the costs, charges, and expenses incident to the collection, management, and receipt thereof, such costs, charges and expenses, being subject, nevertheless, to be reviewed and audited in such manner as shall be directed by any Act of the Legislature of the Province of Canada.

£45,000 to be granted permanently for the services in Schedule A, and £30,000 for the life of Her Majesty and five years following, for those in Schedule B.

52. And be it enacted, That out of the Consolidated Revenue Fund of the Province of Canada there shall be payable in every year to Her Majesty, her heirs and successors, the sum of forty-five thousand pounds, for defraying the expense of the several services and purposes named in the schedule marked A to this Act annexed; and during the life of Her Majesty, and for five years after the demise of Her Majesty, there shall be payable to Her

Majesty, her heirs and successors, out of the said Consolidated Revenue Fund, a further sum of thirty thousand pounds, for defraying the expense of the several services and purposes named in the schedule marked B to this Act annexed; the said sums of forty-five thousand pounds and thirty thousand pounds, to be issued by the Receiver-General, in discharge of such warrant or warrants as shall be from time to time directed to him under the hand and seal of the Governor; and the said Receiver-General shall account to Her Majesty for the same, through the Lord High Treasurer or Lords Commissioners of Her Majesty's Treasury, in such manner and form as Her Majesty shall be graciously pleased to direct.

How the appropriation of sums granted may be varied.

53. And be it enacted, That, until altered by any Act of the Legislature of the Province of Canada, the salaries of the Governor and of the Judges shall be those respectively set against their several offices in the said Schedule A; but that it shall be lawful for the Governor to abolish any of the offices named in the said Schedule B, or to vary the sums appropriated to any of the services or purposes named in the said Schedule B; and that the amount of saving which may accrue from any such alteration in either of the said schedules shall be appropriated to such purposes connected with the administration of the Government of the said Province as to Her Majesty shall seem fit, and that accounts in detail of the expenditure of the several sums of forty-five thousand pounds and thirty thousand pounds hereinbefore granted, and of every part thereof, shall be laid before the Legislative Council and Legislative Assembly of the said Province within thirty days next after the beginning of the session after such expenditure shall have been made: Provided always, that not more than two thousand pounds shall be payable at the same time for pensions to the judges out of the said sum of forty-five thousand pounds, and that not more than five thousand pounds shall be payable at the same time for pensions out of the said sum of thirty thousand pounds; and that a list of all such pensions, and of the persons to whom the same shall have been granted, shall be laid in every year before the said Legislative Council and Legislative Assembly.

Surrender of hereditary revenues of the Crown.

54. And be it enacted, That during the time for which the said several sums of forty-five thousand pounds and thirty thousand pounds are severally payable, the same shall be accepted and taken by Her Majesty by way of

civil list, instead of all territorial and other revenues now at the disposal of the Crown, arising in either of the said Provinces of Upper Canada or Lower Canada, or in the Province of Canada, and that three-fifths of the net produce of the said territorial and other revenues now at the disposal of the Crown within the Province of Canada, shall be paid over to the account of the said Consolidated Revenue Fund; and also during the life of Her Majesty, and for five years after the demise of Her Majesty, the remaining two-fifths of the net produce of the said territorial and other revenues now at the disposal of the Crown within the Province of Canada, shall be also paid over in like manner to the account of the said Consolidated Revenue Fund.

Charges already created in either Province.

55. And be it enacted, That the consolidation of the duties and revenues of the said Province shall not be taken to affect the payment out of the said Consolidated Revenue Fund of any sum or sums heretofore charged upon the rates and duties already raised, levied, and collected, or to be raised, levied and collected, to and for the use of either of the said Provinces of Upper Canada or Lower Canada, or of the Province of Canada, for such time as shall have been appointed by the several Acts of the Legislature of the Province by which such charges were severally authorized.

The order of charges on the Consolidated Fund to be:—1st, Expense of collection; 2nd, Interest of the debt; 3rd, Payments to the Clergy; 4th & 5th, Civil List; 6th, Other charges already made on the public revenue.

56. And be it enacted, That the expenses of the collection, management, and receipt of the said Consolidated Revenue Fund shall form the first charge thereon; and that the annual interest of the public debt of the Provinces of Upper and Lower Canada, or of either of them, at the time of the re-union of the said Provinces, shall form the second charge thereon; and that the payments to be made to the Clergy of the United Church of England and Ireland, and to Clergy of the Church of Scotland, and to Ministers of other Christian denominations, pursuant to any law or usage whereby such payments, before or at the time of passing this Act, were or are legally or usually paid out of the public or Crown revenue of either of the Provinces of Upper and Lower Canada, shall form the third charge upon the said Consolidated Revenue Fund; and that the said sum of forty-five thousand pounds shall form the fourth charge thereon; and that the said sum of thirty thousand pounds, so long as the same shall continue to be payable, shall form the fifth charge thereon; and that the other charges upon the rates and duties levied within the said

Province of Canada herein-before reserved shall form the sixth charge thereon, so long as such charges shall continue to be payable.

Subject to the above charges, the Consolidated Revenue Fund to be appropriated by the Provincial Legislature by Bills, etc.

57. And be it enacted, That, subject to the several payments hereby charged on the said Consolidated Revenue Fund, the same shall be appropriated by the Legislature of the Province of Canada for the public service, in such manner as they shall think proper: Provided always, that all Bills for appropriating any part of the surplus of the said Consolidated Revenue Fund, or for imposing any new tax or impost, shall originate in the Legislative Assembly of the said Province of Canada: Provided also, that it shall not be lawful for the said Legislative Assembly to originate or pass any vote, resolution, or bill, for the appropriation of any part of the surplus of the said Consolidated Revenue Fund, or of any other tax or impost, to any purpose which shall not have been first recommended by a message of the Governor to the said Legislative Assembly during the session in which such vote, resolution, or bill shall be passed.

Townships to be constituted.

58. And be it enacted, That it shall be lawful for the Governor, by an instrument or instruments to be issued by him for that purpose under the Great Seal of the Province, to constitute townships in those parts of the Province of Canada in which townships are not already constituted, and to fix the metes and bounds thereof, and to provide for the election and appointment of township officers therein, who shall have and exercise the like powers as are exercised by the like officers in the townships already constituted in that part of the Province of Canada now called Upper Canada; and every such instrument shall be published by proclamation, and shall have the force of law from a day to be named in each case in such proclamation.

Powers of Governor, how to be exercised.

59. And be it enacted, That all powers and authorities expressed in this Act to be given to the Governor of the Province of Canada shall be exercised by such Governor in conformity with and subject to such orders, instructions, and directions as Her Majesty shall from time to time see fit to make or issue.

Magdalen Islands may be annexed to the Island of Prince Edward. 14 Geo. III., c. 83.

60. And whereas his late Majesty, King George the Third, by his royal proclamation, bearing date the seventh day of October, in the third year of his reign, was pleased to declare that he had put the coast of Labrador, from the River Saint John to Hudson's Straits, with the Islands of Anticosti and Madelaine, and all other

smaller islands lying on the said coast, under the care and inspection of the Governor of Newfoundland: And whereas by an Act passed in the fourteenth year of the reign of his said late Majesty, intituled "An Act for making more effectual provision for the government of the Province of Quebec in North America," all such territories, islands, and counties which had, since the tenth day of February, in the year 1763, been made part of the Government of Newfoundland, were during His Majesty's pleasure, annexed to and made part and parcel of the Province of Quebec, as created and established by the said Royal Proclamation: be it declared and enacted, That nothing in this or any other Act contained shall be construed to restrain Her Majesty, if she shall be so pleased, from annexing the Magdalen Islands, in the Gulf of Saint Lawrence, to Her Majesty's Island of Prince Edward.

Interpretation clause.

61. And be it enacted, That in this Act, unless otherwise expressed therein, the words "Act of the Legislature of the Province of Canada" are to be understood to mean "Act of Her Majesty, her heirs or successors, enacted by Her Majesty, or by the Governor on behalf of Her Majesty, with the advice and consent of the Legislative Council and Assembly of the Province of Canada;" and the words "Governor of the Province of Canada" are to be understood as comprehending the Governor, Lieutenant-Governor, or person authorized to execute the office or the functions of Governor of the said Province.

Act may be amended, etc.

62. And be it enacted, That this Act be amended or repealed by any Act to be passed in the present session of Parliament.

SCHEDULES.

Schedule A.

Governor	£7,000
Lieutenant-Governor	1,000

Upper Canada.

1 Chief Justice	1,500
4 Puisne Judges, at £900 each	3,600
1 Vice-Chancellor	1,125

Lower Canada.

1 Chief Justice, Quebec	1,500
3 Puisne Judges, Quebec, at £900 each	2,700
1 Chief Justice, Montreal	1,100
3 Puisne Judges, Montreal, at £900 each	2,700
1 Resident Judge at Three Rivers	900
1 Judge of the Inferior District of St. Francis	500
1 Judge of the Inferior District of Gaspé	500
Pensions to the Judges, Salaries of the Attorneys and Solicitors-General, and Contingent and Miscellaneous Expenses of Administration of Justice throughout the Province of Canada	20,875
	£45,000

Schedule B.

Civil Secretaries and their offices	£8,000
Provincial Secretaries and their offices	3,000
Receiver-General and his office	3,000
Inspector-General and his office	2,000
Executive Council	3,000
Board of Works	2,000
Immigrant Agent	700
Pensions	5,000
Contingent Expenses of Public Offices	3,300
	£30,000

IMP. ACT, 17 & 18 V. c. 118—1854.

AN ACT TO EMPOWER THE LEGISLATURE OF CANADA TO ALTER THE CONSTITUTION OF THE LEGISLATIVE COUNCIL FOR THAT PROVINCE, AND FOR OTHER PURPOSES.

Preamble.

Whereas an Act of the Session of Parliament holden in the third and fourth years of Her Majesty, chapter thirty-five, "to reunite the Provinces of Upper and Lower Canada, and for the Government of Canada," provides amongst other things for the establishment of a Legislative Council in the Province of Canada, consisting of Members summoned thereto by the Governor, under the authority of Her Majesty as therein specified: And whereas it is expedient that the Legislature of the said Province should be empowered to alter the constitution of the said Legislative Council: And whereas the said Act requires amendment in other respect: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power to the Legislature of Canada to alter the constitution of the Legislative Council.

1. It shall be lawful for the Legislature of Canada by any Act or Acts to be hereafter for that purpose passed, to alter the manner of composing the Legislative Council of the said Province, and to make it consist of such number of Members appointed or to be appointed or elected by such persons and in such manner as to the said Legislature may seem fit, and to fix the qualifications of the persons capable of being so appointed or elected, and by such Act or Acts to make provision, if they shall think fit, for the separate dissolution by the Governor of the said Legislative Council and Legislative Assembly respectively, and for the purposes aforesaid to vary and repeal in such manner as to them may seem fit all or any of the sections and provisions of the said recited Act, and of any other Act of Parliament now in force which relate to the Constitution of the Legislative Council of Canada: Provided always, that any Bill or Bills which shall be passed by the present Legislative Council and Assembly of Canada for all or any of the purposes aforesaid shall be reserved by the said Governor, unless he think fit to withhold Her Majesty's assent thereto, for the signification of Her Majesty's pleasure, and shall be subject to the enactments of the said recited Act of the third and fourth

Proviso: Act to be reserved.

years of Her Majesty, chapter thirty-five, section thirty-nine, which relate to Bills so reserved for the signification of Her Majesty's pleasure.

Provisions of former Acts of Parliament to apply to the new Legislative Council.

2. As soon as the constitution of the Legislative Council of the Province of Canada shall have been altered under such Act or Acts so assented to by Her Majesty as aforesaid, all provisions of the said recited Act of Parliament of the third and fourth years of Her Majesty, chapter thirty-five, and of any other Act of Parliament now in force relating to the Legislative Council of Canada, shall be held to apply to the Legislative Council so altered, except so far as such provisions may have been varied or repealed by such Act or Acts of the Legislature of Canada so assented to as aforesaid.

Power to the Legislature of Canada to vary the provisions of the Act or Acts constituting the new Legislative Council.

3. It shall be lawful for the Legislature of Canada from time to time to vary and repeal all or any of the provisions of the Act or Acts altering the constitution of the said Legislative Council: Provided always, that any Bill for any such purpose which shall vary the qualification of councillors, or the duration of office of such councillors, or the power of the Governor to dissolve the Council or Assembly, shall be reserved by the Governor for the signification of Her Majesty's pleasure in manner aforesaid.

To vary or repeal the property qualification of members of the Legislative Assembly.

4. It shall be lawful for the Legislature of Canada by any Act or Acts reserved for the signification of Her Majesty's pleasure, and whereto Her Majesty shall have assented as hereinbefore provided, to vary or repeal any of the provisions of the recited Act of Parliament of the third and fourth years of Her Majesty which relate to the property qualification of Members of the Legislative Assembly.

Proviso in sect. 26 of 3 & 4 V. c. 35, repealed.

5. So much of the twenty-sixth section of the said recited Act of Parliament as provides that it shall not be lawful to present to the Governor of the Province of Canada for Her Majesty's assent any Bill of the Legislative Council and Assembly of the said Province by which the number of representatives in the Legislative Assembly may be altered unless the second and third reading of such Bill in the Legislative Council and the Legislative Assembly shall have been passed with the concurrence of two-thirds of the Members for the time being of the said Legislative Council, and of two-thirds of the Members for the time being of the said Legislative Assembly respectively, and that the assent of Her Majesty shall not be given to any such Bill unless addresses shall

have been presented by the Legislative Council and the Legislative Assembly respectively to the Governor stating that such Bill has been so passed, is hereby repealed.

Section 42 of 3 & 4 V. c. 35, repealed.

6. The forty-second section of the said recited Act of Parliament, providing that in certain cases Bills of the Legislative Council and Assembly of Canada shall be laid before both Houses of Parliament of the United Kingdom, is hereby repealed; and, notwithstanding anything in the said Act of Parliament or in any other Act of Parliament contained, it shall be lawful for the Governor to declare that he assents in Her Majesty's name to any Bill of the Legislature of Canada, or for Her Majesty to assent to any such Bill if reserved for the signification of Her pleasure thereon, although such Bill shall not have been laid before the said Houses of Parliament; and no Act heretofore passed or to be passed by the Legislature of Canada shall be held invalid or ineffectual by reason of the same not having been laid before the said Houses, or by reason of the Legislative Council and Assembly not having presented to the Governor such Address as by the the said Act of Parliament is required.

Interpretation of terms.

7. In this Act the word "Governor" is to be understood as comprehending the Governor, and in his absence the Lieutenant-Governor, or person authorized to execute the office or the functions of the Governor of Canada.

RETURN*

PRINCE EDWARD ISLAND.

TO AN ADDRESS OF THE HOUSE OF COMMONS, DATED 1ST MARCH, 1882; — FOR COPIES OF THE CHARTERS OR CONSTITUTIONS GRANTED BY THE CROWN OR THE IMPERIAL PARLIAMENT TO THE PROVINCES OF CAPE BRETON, NOVA SCOTIA, PRINCE EDWARD ISLAND, NEW BRUNSWICK, BRITISH COLUMBIA AND VANCOUVER ISLAND; ALSO, COPIES OF ALL ACTS, CHARTERS, ROYAL INSTRUCTIONS, COMMISSIONS, ORDERS IN COUNCIL, OR DESPATCHES ALTERING OR AMENDING THE SAME, AS ORIGINALLY GRANTED, OR CONFERRING OR WITHDRAWING ANY POLITICAL RIGHTS OR PRIVILEGES BEFORE OR AFTER THE GRANTING OF SUCH CHARTERS.

GOVERNMENT HOUSE,
PRINCE EDWARD ISLAND,
19th October, 1882.

SIR,—I have the honour to acknowledge the receipt of your despatch, of the 24th of August last, requesting me to cause to be procured and transmitted to your Department, for the information of the House of Commons, copies of the charters or constitutions granted by the Crown to the Province of Prince Edward Island. Also your despatch, of the 6th October instant upon the same subject. Immediately after the receipt of the first despatch above mentioned, I gave instructions to the Assistant Provincial Secretary to procure the information thereby required, and yesterday I received from him a letter enclosing a copy of the Commission of Walter Paterson, Esq., the first Governor of Prince Edward Island, bearing date 4th August, 1769.

I now transmit herewith the said copy of the Governor's Commission, together with the letter (1) of the Assistant Provincial Secretary.

You will observe by the letter that the Royal instructions referred to in the said Commission are not to be

* This Return is printed as No. 70 of the Sessional Papers of Canada, for 1883.

(1) Not printed in this Appendix.

found in any public office of the Province, but, doubtless, the original Royal instructions are on file among the Archives of the Colonial Office, London. PRINCE EDWARD ISLAND

I have the honour to be, Sir,
Your most obedient servant,

T. HEATH HAVILAND,
Lieut.-Governor.

The Honourable the Secretary of State,
Ottawa.

GEORGE THE THIRD, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, etc.

To our trusty and well-beloved WALTER PATERSON, Esquire,

GREETING:—

WHEREAS, by our Letters Patent bearing date at Westminster the eleventh day of August, 1766, in the sixth year of Our Reign, [we did] constitute and appoint our trusty and well-beloved William Campbell, Esquire, commonly called Lord William Campbell, to be our Captain-General and Governor-in-Chief in and over our Province of Nova Scotia, bounded on the westward by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the River St. Croix, by the said river to its source, and by a line drawn due north from thence to the southern boundary of Our Colony of Quebec, to the northward by the said boundary as far as the western extremity of the Bay des Chaleur, to the eastward by the said bay and the Gulf of St. Lawrence to the Cape or Promontory called Cape Breton in the Island of that name, including that Island, the Island St. John, and all other islands within six leagues of the coast, and to the southward by the Atlantic Ocean from the said Cape to Cape Sable aforesaid, including the Island of that name, and all other Islands within forty leagues of the coast, with all the rights, members and appurtenances whatsoever thereunto belonging for and during our will and pleasure as by the said recited Letters Patent, relation being thereunto had may more fully and at large appear. Now Know You, that we have revoked and determined, and

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by these presents do revoke and determine, such parts and so much of the said recited Letters Patent, and every clause, article and thing therein contained as relates to or mentions the Island of St. John. And Further Know You, that we, reposing especial trust and confidence in the prudence, courage and loyalty of you the said Walter Paterson, of Our especial Grace, certain knowledge and mere motion, have thought fit to constitute and appoint and by these Presents do constitute and appoint you, the said Walter Paterson, to be our Captain-General and Governor-in-Chief in and over our Island of Saint John, and territories adjacent thereto in America, and which now are or heretofore have been dependent thereupon, and We do hereby require and command you to do and execute all things in due manner that shall belong to your said command, and the trusts we have reposed in you according to the several powers and directions granted or appointed you by the present Commission, and the instructions and authorities herewith given to you, or by such further powers, instructions and authorities as shall at any time hereafter be granted or appointed you under our Signet and Sign Manual or by our order in our Privy Council, and according to such reasonable Laws and Statutes as shall be made and agreed upon by you, with the advice and consent of the Council and Assembly of the Island under your Government, in such manner and form as is hereafter expressed; and our will and pleasure is that you, the said Walter Paterson, do, after the publication of these our Letters Patent, and after the appointment of Our Council of Our said Island, in such manner and form as is prescribed in the instructions which you will herewith receive, in the first place take the oath appointed to be taken by an Act passed in the first year of King George the First, intituled: "An Act for the further security of His Majesty's Person and Government, and the succession of the Crown in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors." As also that you make and subscribe the declaration mentioned in an Act of Parliament in the twenty-fifth year of the Reign of King Charles the Second, intituled: "An Act for preventing dangers which may happen from Popish Recusants." And likewise that you take the oath usually taken by Governors in other

Colonies, for the due execution of the office and Trust of Our Captain-General and Governor-in-Chief in and over Our said Island and for the due and impartial administration of Justice. And further, that you take the oath required to be taken by Governors in the Plantations to do their utmost that the several Laws relating to Trade and the Plantations be duly observed, which said Oath and Declarations Our Council of our said Island or any three of the members thereof have hereby full power and authority and are required to tender and administer to you, and in your absence to Our Lieutenant-Governor of Our said Island, all which being duly performed you shall yourself administer unto each of the members of our said Council, and also to our Lieutenant-Governor of Our said Island, the said Oath mentioned in the said Act intituled: "An Act for the further security of His Majesty's Person and Government, and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors;" as also cause them to make and subscribe the afore-mentioned declaration, and to administer unto them the usual Oaths for the due execution of their places and trusts.

And We do further give and grant unto you, the said Walter Paterson, full power and authority from time to time, and at any time hereafter, by yourself, or by any other to be authorized by you in this behalf, to administer and give the Oath mentioned in the said Act, "for the further security of His Majesty's Person and Government, and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," to all and every such person and persons as you shall think fit, who shall at any time or times pass into Our said Island, or shall be resident or abiding there.

And We do hereby authorize and empower you to keep and use the public seal which will be herewith delivered to you, or shall be hereafter sent to you, for sealing all things whatsoever that shall pass the Great Seal of Our said Island.

And We do hereby give and grant unto you, the said Walter Paterson, full power and authority, with the advice and consent of Our said Council to be appointed as aforesaid, so soon as the situation and circumstances of

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Our Island under your Government will admit thereof, and when, and as often as We shall require, to summon and call Council Assemblies of the Freeholders and Planters within the Island under your Government, in such manner as you in your discretion shall judge most proper, or according to such further powers, instructions, and authorities, as shall be at any time hereafter granted or appointed you under our Signet and Sign Manual, or by Our Order in Our Privy Council. And Our Will and pleasure is that the persons thereupon duly elected by the major part of the Freeholders of the respective Counties, Parishes, or Townships so returned, shall before their sitting take the Oath mentioned in the said Act intituled: "An Act for the further security of His Majesty's Person and Government, and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," as also make and subscribe the afore-mentioned declaration. Which oaths and declarations you shall commissionate fit persons under the public seal of that Our Island, to tender and administer unto them, and until the same shall be so taken and subscribed, no person shall be capable of sitting though elected. And, We do hereby declare, that the persons so elected and qualified shall be called and deemed The Assembly of Our Said Island of Saint John. And, that you, the said Walter Paterson, by, and with the advice and consent of Our said Council and Assembly, or the major part of them, shall have full power and authority to make, constitute and ordain, laws, statutes and ordinances for the public peace, welfare and good government of our said Island, and of the people and inhabitants thereof, and such others as shall resort thereunto, and for the benefit of Us, Our Heirs and Successors, which said Laws, Statutes and Ordinances are not to be repugnant, but as near as may be agreeable to the Laws and Statutes of this Our Kingdom of Great Britain. Provided that all such Laws, Statutes and Ordinances, of what nature or duration so ever, be, within three months or sooner after the making thereof, transmitted to Us under Our Seal of Our said Island, for our approbation or disallowance of the same, as also duplicates thereof by the next conveyance. And, in case any or all of the said Laws, Statutes and Ordinances not before confirmed by Us, shall at any time be disallowed and not approved and so signified by

Us, our Heirs and Successors, under Our or their Signet and Sign Manual, or by order of Our or their Privy Council unto you the said Walter Paterson, or to the Commander-in-Chief of the said Island for the time being, then such and so many of the said Laws, Statutes and Ordinances as shall be so disallowed and not approved, shall from thenceforth, cease, determine and become utterly void and of none effect, anything to the contrary thereof notwithstanding. And to the end that nothing may be passed, or done by Our said Council or Assembly to the prejudice of Us, Our Heirs and Successors. We Will and Ordain, that you the said Walter Paterson, shall have and enjoy a negative voice in the making and passing of all Laws, Statutes and Ordinances as aforesaid, and that you shall and may likewise, from time to time, as you shall judge necessary, adjourn, prorogue, or dissolve all General Assemblies as aforesaid.

And We do by these Presents, give and grant unto you, the said Walter Paterson, full power and authority, with the advice and consent of Our said Council, to erect, constitute and establish such and so many Courts of Judicature and Public Justice within Our said Island, under your Government, as you and they shall see fit and necessary for the hearing and determining of all causes, as well Criminal as Civil, according to Law and Equity, and for awarding execution thereupon with all reasonable and necessary powers, authorities, fees and privileges belonging thereto, as also to appoint and commissionate fit persons in the several parts of your Government to administer the Oath mentioned in the aforesaid Act, as also to tender and administrate the aforesaid declaration to such persons belonging to the said Court, as shall be obliged to take the same. And We do hereby grant unto you, full power and authority to constitute and appoint Judges, and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace, Sheriffs, and other necessary Officers and Ministers in Our said Island, for the better administration of Justice, and putting the Laws in execution, and to administer or cause to be administered unto them, such Oath or Oaths as are usually given for the due execution and performance of offices and places, and for the clearing of truth in judicial causes. And We do hereby give and grant unto you, full power and authority when you shall see cause or shall judge any offender or offenders in criminal matters, or for any

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fines or forfeitures due unto Us, fit objects of Our mercy to pardon all such offenders, and to remit all such offences, fines and forfeitures, treason and wilful murder only excepted. In which cases you shall likewise have power upon extraordinary occasions to grant reprieves to the offenders until and to the intent Our Royal pleasure may be known thereon.

We do by these Presents authorize and empower you to collate any person or persons to any Churches, Chapels, or other Ecclesiastical benefices within our said Island, as often as any of them shall happen to be void.

And We do hereby give and grant unto you, the said Walter Paterson, by yourself or by your Captains and Commanders by you to be authorized, full power and authority to levy, arm, muster, command and employ all persons whatsoever, residing within Our said Island, and as occasion shall serve, to march from one place to another, or to embark them for the resisting and withstanding of all enemies, pirates and rebels both at land and sea, and to transport such forces to any of our Plantations in America, if necessity shall require, for the defence of the same against the invasion or attempts of any of Our enemies, and to execute Martial Law in time of invasion or other times when by law it may be executed, and to do and execute all and every other thing or things which to our Captain-General and Governor-in-Chief doth or ought of right to belong. And We do hereby give and grant unto you full power and authority by and with the advice and consent of Our said Council to erect, raise and build in Our said Island such and so many Forts and Platforms, Castles, Cities, Boroughs, Towns and Fortifications as you by the advice aforesaid shall judge necessary, and the same or any of them to fortify and furnish with ordnance, ammunition and all sorts of Arms fit and necessary for the security and defence of our said Island, and by the advice aforesaid the same again or any of them to demolish or dismantle as may be most convenient.

And forasmuch divers mutinies and disorders may happen by persons shipped and employed at sea during the time of war, and to the end that such as shall be shipped and employed at sea during the time of war may be better governed and ordered, We do hereby grant and give unto you, the said Walter Paterson, full power and authority to constitute and

appoint Captains, Lieutenants, Masters of Ships and other Commanders and Officers, and to grant to such Captains, Lieutenants, Masters of Ships and other Commanders and Officers commissions to execute the Law Martial during the time of war according to the directions of an Act passed in the twenty-second year of the Reign of Our late Royal Grandfather, intituled, "An Act for amending, explaining and rendering into one Act of Parliament the laws relating to the Government of His Majesty's Ships, Vessels and forces by sea;" and to use such proceedings, authorities, punishments and executions upon any offender or offenders as shall be mutinous, seditious, disorderly or any way unruly either at sea or during the time of their abode or residence in any of the Ports, Harbours or Bays of Our said Island, as the cause shall be found to require according to Martial Law and the said directions during the time of war as aforesaid. Provided that nothing herein contained shall be construed to the enabling you, or any by your authority, to hold, place, or have any jurisdiction of any offence, cause, matter, or thing committed or done upon the high sea, or within any of the havens, rivers, or creeks of Our said Island under your command, by any Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or person whatsoever, who shall be in Our actual service and pay in or on board any of Our Ships of War, or other Vessel acting by immediate Commission of Warrant from Our Commissioners for executing the office of Our High Admiral, or from our High Admiral of Great Britain for the time being, under the Seal of Our Admiralty, but that such Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or other person so offending, shall be left to be proceeded against and tried as their offences shall require, either by Commission under Our Great Seal of Great Britain, as the Statute of the twenty-eighth of Henry the Eighth directs, or by Commission from Our said Commissioners for executing the office of Our High Admiral, or from Our High Admiral of Great Britain for the time being, according to the aforementioned Act, intituled, "An Act for amending, explaining, and rendering into one Act of Parliament the Laws relating to the Government of His Majesty's Ships, Vessels, and Forces by sea," and not otherwise; Provided, nevertheless, that all disorders and misdemeanours committed on shore by any Captain, Commander, Lieutenant, Master,

PRINCE EDWARD ISLAND.

Officer, Seaman, Soldier, or other person whatsoever, belonging to any of Our Ships of War, or other Vessels acting by immediate Commission or Warrant from Our said Commissioners for executing the office of Our High Admiral, or from Our High Admiral of Great Britain for the time being, under the Seal of our Admiralty, may be tried and punished according to the Laws of the place where any such disorders, offences, and misdemeanours shall be committed on shore, notwithstanding such offender be in Our actual service, and borne in Our pay on board any such Our Ships of War, or other Vessels acting by immediate Commission or Warrant from Our said Commissioners for executing the office of High Admiral, or Our High Admiral of Great Britain for the time being, as aforesaid, so as he shall not receive any protection for the avoiding of justice for such offences committed on shore from any pretence of his being employed in Our service at sea.

And our further will and pleasure is that all public money raised, or which shall be raised by any Act hereafter to be made within Our said Island, be issued out by warrant from you, by and with the advice and consent of the Council, and disposed of by you for the support of the Government, and not otherwise; And We likewise give and grant unto you full power and authority, by and with the advice and consent of Our said Council, to settle and agree with the inhabitants of Our said Island for such lands, tenements and hereditaments as now are, or hereafter shall be, in Our power to dispose of and them to grant to any person or persons, upon such terms and under such moderate Quit Rents, services and acknowledgments, to be thereupon reserved unto Us, as you, with the advice aforesaid, shall think fit, which said grants are to pass and be sealed by Our Public Seal of Our said Island, and being entered upon Record by such Officer or Officers as shall be appointed thereunto, shall be good and effectual in law against Us, Our Heirs and Successors.

And We do hereby give you, the said Walter Paterson, full power and authority to order and appoint Fairs, Marts and Markets, as also such and so many Ports, Harbours, Bays, Havens and other places for the conveniency and security of Shipping, and for the better loading and unloading of goods and merchandize, in such and so many places as, by and with the advice and consent of Our said Council, shall be thought fit and necessary.

And We do hereby require and command all Officers and Ministers, civil and military, and all other Inhabitants of Our said Island, to be obedient, aiding and assisting, unto you, the said Walter Paterson, in the execution of this Our Commission, and of the powers and authorities herein contained, and in case of your death or absence out of Our said Island, to be obedient, aiding and assisting unto such person as shall be appointed by us to be Our Lieutenant-Governor or Commander-in-Chief of Our said Island, to whom We do, therefore, by these Presents, give and grant all and singular the power and authorities herein granted, to be by him executed and enjoyed during Our pleasure or until your arrival within Our said Island, and if, upon your death or absence out of Our said Island, there be no person upon the place commissionated or appointed by Us to be Our Lieutenant-Governor or Commander-in-Chief of the said Island, Our will and pleasure is that the eldest Councillor who shall be, at the time of your death or absence, residing within Our said Island, shall take upon him the Administration of the Government, and execute our said Commission and Instructions, and the several powers and authorities therein contained, in the same manner, and to all intents and purposes, as either Our Governor or Commander-in-Chief should or ought to do, in case of your absence, until your return, or in all cases until Our further pleasure be known therein; And We do hereby declare, ordain and appoint, that you, the said Walter Paterson shall and may hold, execute and enjoy the office and place of Our Captain-General and Governor-in-Chief in and over Our said Island of Saint John, with all its rights, members and appurtenances whatsoever, together with all and singular the powers and authorities hereby granted unto you, for and during Our will and pleasure.

In Witness whereof, We have caused these our Letters to be made Patent: Witness Ourselves, at Westminster, the fourth day of August, in the ninth year of our Reign.

By Writ of Privy Council,

YORKE Q. YORKE.

I certify the above to be a true copy.

ARTHUR NEWBURY,
Assistant Provincial Secretary,
Prince Edward Island.

October 18th, 1882.

Nova Scotia.

GOVERNMENT HOUSE,
HALIFAX, N.S., September 16th, 1882.

SIR,—I have the honour to acknowledge the receipt of Mr. Under-Secretary Langevin's despatch, under date of the 24th ultimo, asking me to procure and transmit to your Department, for the information of the House of Commons, as called for by an Address of that body, copies of the charters or constitutions granted by the Crown to the Province of Nova Scotia and Cape Breton, if these documents were to be found among the records of these Provinces, and otherwise to inform the Department of their dates and particulars; and in reply I have the honour to state that I know of no such charters or constitutions, and cannot ascertain that any formal charters or constitutions were ever granted by the Crown to either of these Provinces.

It has always been understood here that the constitution of the Province of Nova Scotia, and that of Cape Breton, while it was a separate Province, were to be deduced from the Royal Commissions to the various Governors appointed from time to time, and the instructions accompanying such commissions, moulded to some extent by the interpretations of these documents by long and uniform usage in the colony.

If the Department desires it, copies of these Commissions and Instructions, which vary from time to time in minor particulars, or at all events copies of such of them as have been preserved and bound up in the Archives of the Record Commission of this Province, could be obtained and forwarded, but a complete series of these documents could be procured only from the Colonial Office in Downing Street.

I have the honour to be, Sir,
Your obedient servant,

ADAMS G. ARCHIBALD,
Lieutenant-Governor.

Hon. Secretary of State for Canada.

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GOVERNMENT HOUSE,
HALIFAX, N.S., 20th December, 1882.

SIR,—Adverting to your despatch of the 24th of August last, asking me to cause to be procured and transmitted to your Department for the information of the House of Commons, as called for by an Address of that body during the last Session, copies of the charters and colonial constitutions granted by the Crown to the Provinces of Nova Scotia and Cape Breton, if these documents were to be found among the archives of Nova Scotia; adverting also to my reply thereto, under date of the 16th of September, in which I mentioned that there were no formal charters or constitutions, and stated what were understood to be the sources from which the constitutions of these Provinces were derived; adverting also to a further despatch from you under date of the 6th of October last on the same subject, desiring to have copies of certain documents therein mentioned; adverting also to the terms of the Address adopted by the House of Commons, in which the Return is required to embrace not only the charters and constitutions granted by the Crown or the Imperial Parliament, but also "copies of all Acts, Charters, Royal Instructions, Commissions, Orders in Council, or despatches altering or amending the same as originally granted or conferring or withdrawing any political rights or privileges before or after the granting of such charters."

I have now the honour to report, for the information of the House of Commons, that, so far as I am able to ascertain the facts, no formal charter or constitution ever was conferred, either on the Province of Nova Scotia, or upon Cape Breton, while that Island was a separate Province.

The Constitution of Nova Scotia has always been considered as derived from the terms of the Royal Commissions to the Governors and Lieutenant-Governors, and from the instructions which accompanied the same, moulded from time to time by despatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the Local Legislature, assented to by the Crown; the whole to some extent interpreted by uniform usage and custom in the colony.

From 1713 to 1758, the Provincial Government consisted of a Governor or Lieutenant-Governor and a Coun-

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cil, the latter body supposed to possess both legislative and executive powers.

The Governor and Council undertook as a legislative body to pass ordinances which for a time were deemed to have the force of law. Some questions appear to have arisen as to the obligatory character of these ordinances.

By a letter under date of the 7th May, 1755, to be found in our Archives, from the Lords of Plantations to Governor Lawrence, an extract from which will be found annexed hereto marked A (1), it would appear that Chief Justice Belcher was of opinion that the ordinances had not the force of law, and that his opinion had received the concurrence of the Law Officers of the Crown in England.

The Lords of Plantations consequently required the Lieutenant-Governor to consult the Chief Justice as to the best mode of carrying into effect the intention of His Majesty to have an Assembly summoned.

An answer being procured from the Chief Justice, and forwarded, in reply to this letter, the Lieutenant-Governor received a despatch from the Lords of Plantations under date of the 25th March, 1756, containing comments on the Chief Justice's proposition, and copious instructions in reference to various matters connected with it, in which they state that notwithstanding the numberless objections to the proposed step, the want of power in the Governor and Council to pass valid laws, rendered that step absolutely necessary.

An extract from this despatch is annexed, marked B (2).

The Chief Justice's proposals, together with Mr. Lawrence's instructions and extracts from the despatches were, on the 3rd November, 1756, submitted by him to his Council for their opinion and advice, as appears by a Minute of Council of that date, of which a copy is annexed, marked C (3).

On the 3rd January, 1757, after repeated intermediate deliberations, a Minute of Council was formally adopted, setting forth the scheme as finally recommended by the Governor in Council for the constituting and calling of an Assembly. A copy of the Minute last referred to is hereto annexed, marked D (4).

The plan so submitted, being duly forwarded to the Lords of Plantations, was in the main adopted, as will appear by a reply to Governor Lawrence, dated 7th

(1) *Post*, p. 529. (2) *Post*, p. 530. (3) *Post*, p. 533. (4) *Post*, p. 534.

February, 1758, in which, adverting to the objections to that step, persistently urged by the Lieutenant-Governor, the Lords of Plantations direct its being carried into immediate execution; at the same time they furnish certain additional instructions in reference to this subject. I append an extract from this despatch, marked E (1).

Under these instructions the First House of Assembly was elected. It met on the 2nd October, 1758. The Council continued to exercise both Executive and Legislative powers from 1758 to 1838.

In 1837, the House of Assembly adopted a series of resolutions, touching among other things the composition and constitution of the Council. (These, however, they rescinded during the same Session.) The proceedings, nevertheless, were duly reported by Sir Colin Campbell, the Lieutenant-Governor, to Lord Glenelg, then Secretary of State for the Colonies.

Shortly afterwards, the Secretary, in a despatch dated 30th April, 1837, of which an extract is appended hereto, marked F (2), expresses the assent of His Majesty to the separation of the Council into two distinct bodies. In 1838, this policy was carried out. Two separate Councils were appointed, one an Executive Council, the other a Legislative Council, under the authority of this despatch, followed by Royal Instructions given to the Earl of Durham. A copy of these instructions authorizing the appointment of an Executive Council, not to exceed nine in number, and a Legislative Council not to exceed fifteen, will be found appended hereto, marked R (3), among the copies of the Royal instructions appended. The same instructions were repeated verbatim when a commission was given in 1839, to Mr. C. Poulett Thompson, afterwards Lord Sydenham, as successor to Lord Durham. The two Councils thus formed, continue in existence to this day.

By a clause in the commission to Lord Monck, a printed copy of which will be found in the Appendix to the Journals of the House of Assembly for 1862, No. 34, power was given to extend the numbers of the Legislative Council to twenty-one, which was the limit at the date of the Act of Union, and remains unaltered to this day. On the 16th October, 1839, Lord John Russell addressed a despatch to Sir Colin Campbell, in reference to the tenure

(1) *Post*, p. 538. (2) *Post*, p. 540. (3) Not printed in this Appendix.

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of office in Nova Scotia, which is considered as materially affecting the Constitution of the Province. A copy of this despatch is annexed hereto, marked G. (1).

In the original scheme of an Assembly there was no limit to its duration. The same Assembly elected in 1770 sat till 1785 without dissolution.

In 1792 an Act was passed for limiting its duration to seven years; a copy is hereto annexed, marked H. (1).

This continued the law till 1840, when an Act, 3 Vict. c. 4, was passed, which is still in force, limiting the duration to four years, a copy of which is hereto annexed, marked I. (1).

Various Acts of the Provincial Legislature altering the representation, the qualification of voters, the boundaries of districts, etc., etc., it is assumed are not required for the purposes of the Return.

Certain provisions in reference to the Legislative Council and Assembly, to Legislative and Executive disabilities, to the duration of and representation in the General Assembly are contained in chapters 2, 3, 4 and 7 of the Revised Statutes, 4th series, of which a copy is hereto annexed, marked K. (1).

On inquiry I cannot ascertain that any of the original Commissions to the Governors General are to be found among our Archives. I find some of the original Commissions to Lieutenant-Governors.

Of that class those to Sir James Kempt, Sir Peregrine Maitland and Sir Colin Campbell are bound up in one of the manuscript volumes of the Records Commission. A copy of each of these Commissions is hereunto annexed, marked respectively L (1), M (2), N (3).

A copy of the Commission to Lord Monck as Governor-General is to be found in the Journals of the Assembly of Nova Scotia for the year 1862, being No. 34 of the appendix. As the Journals are accessible in the Parliamentary Library at Ottawa, it is not supposed to be necessary to transcribe this document.

As regards the Royal Instructions to the several Governors and Lieutenant-Governors, these were of two classes; one class referred to the administration of local affairs, the other to transactions connected with the Imperial Acts for the regulation of trade and commerce, and other matters beyond the jurisdiction of the Local

(1) Not printed in this Appendix. (2) *Post*, p. 542. (3) *Post*, p. 543.

Legislature. The latter class, I assume, is not within the scope of the resolution requiring the Return.

As regards the class of instructions referring to local affairs, our Archives contain a considerable number of these, but by no means a complete series.

Annexed hereto, marked O (1), is a list of such of the original codes of instructions as are bound up in our Archives, with the date of issue of, and the number of clauses in each code.

The list specifies these particulars, not only of the instructions which refer to local affairs, but also of those which touch trade and plantation.

In the Assembly Journals of 1859, No. 28 of the Appendix, page 427, a copy of the Royal Instructions to Sir Edmund Head, dated 20th September, 1854, containing 36 clauses; and in the Journals of 1862, No. 34 of the Appendix, a copy of the instructions to Lord Monck, containing 15 clauses, will be found.

These can be seen by reference to the Journals in the Library at Ottawa.

The Codes of Instructions to be found in our Archives, as mentioned above, are bound up in three folio manuscript volumes.

In some respects they vary according to public exigencies, but those clauses which refer to the constitution of the different branches of the Legislature, and other matters of a similar nature are generally repeated verbatim, except where changes in the Constitution, such as those specified in the former part of this paper, are required to be made.

It is apprehended that it will carry out the object of the resolution of the House of Commons, if a copy is made of the Royal Instructions, or of such part of them as bear on the subject of inquiry at each of the periods following—

1st. In the period during which a Governor and Council passed ordinances as if they possessed the powers of a Legislature. 2nd. In the period after the summoning of the First Assembly during which the Legislature consisted of a Governor, Council and Assembly; the same Council being clothed with different functions, at one time sitting as a Legislative body, at another as the advisers of the Governor. 3rd. In the period after the

(1) *Post*, p. 544.

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separation of the Council, during which the Legislature consisted of a Governor, Legislative Council and House of Assembly, and when a separate and distinct body acted as an Executive Council. As a sample of the Royal Instructions during the period No. 1, I enclose a copy of those of Mr. Richard Phillips, dated 1st July, 1729, marked P (1).

Of those during period No. 2, I annex as samples copy of the instructions given to Governor Lawrence dated the 15th day of March, 1756, marked Q (2). Also copy of those given to Governor Wilmot on the 16th March, 1764. See annex marked QQ (3).

Of those during period No. 3, I refer to the instructions given to Sir Edmund Walker Head and to Lord Monck, printed as above stated, in the Appendix to the Journals of 1854 and 1859.

I annex a copy of the instructions to the Earl of Durham, under which the Councils were separated, and of the additional instructions to appoint the first Executive Council. See annexes marked R (5), and RR (5), and RRR (4).

As regards that branch of the subject which concerns the Island of Cape Breton whilst it was a separate Province, I have to observe that by Royal Proclamation, dated 7th of October, 1763, a few years after the capture of Louisburg, the island was annexed to the Government of Nova Scotia.

In 1766 the Legislature of Nova Scotia passed an Act declaring that the laws of Nova Scotia extended to the Island of Cape Breton. See Province Laws, Vol. I., page 119. (Statute printed at large in the Appendix to Journals of Nova Scotia Assembly for 1841, p. 156.)

After the annexation the island was included in the Commission to the Governors and Lieutenant-Governors of Nova Scotia.

Any observations hereinbefore contained in reference to Nova Scotia will apply to the Island of Cape Breton up to 1784, when it was severed from Nova Scotia and made a separate Government, subordinate to that of Nova Scotia. This was done under the authority of a despatch from Lord Sydney, then Secretary of State, addressed to Governor Paw, dated 28th of May of that

(1) *Post*, p. 545. (2) *Post*, p. 554. (3) *Post*, p. 555. (4) *Post*, p. 570.
(5) Not printed in this Appendix.

year, a copy of which is printed in the Journals of the Assembly of Nova Scotia for 1841, being contained in No. 60 of the Appendix. NOVA SCOTIA.

Shortly afterwards Major Frederick Wallet Desbarres was appointed Lieutenant-Governor of the island, and, on assuming office, appointed a Council, which appears not to have been advisory only, but to have claimed and exercised legislative powers, and, with the Lieutenant-Governor, to have passed ordinances supposed to have the force of law.

I am not able to forward a copy of Lieutenant-Governor Desbarres' Commission, as it is not among our Archives, but from the wording of a resolution moved in the House of Assembly of Nova Scotia, in 1841, it would appear that it contained a clause authorizing him to summon an Assembly when the circumstances of the colony would admit.

A similar clause was inserted in the Commission of Governor Lawrence, before he was expressly ordered to call an Assembly.

See Journals of 1841, page 186.

The power of calling an Assembly was not exercised while the Island remained a separate Province. No question seems to have arisen as to the constitutionality of this separation. But as a Representative Assembly had not only been promised to, but had actually been conferred upon, and enjoyed by the inhabitants of Nova Scotia, of which Cape Breton was a part, it seems open to doubt how far rights and privileges of the kind could be withdrawn by a mere act of the Crown.

The Constitution, consisting of a Governor and Council, remained in force till the re-annexation of Cape Breton in 1820.

By a despatch from Earl Bathurst to Sir James Kempt, dated 15th August, 1820, printed in the Journals of the Assembly of Nova Scotia, for 1841, and forming part of No. 60 of the Appendix, the Secretary of State communicated to the Governor the intention of His Majesty to re-annex the Island of Cape Breton to the Government of Nova Scotia.

On the 9th October following, Sir James issued a Proclamation carrying out His Majesty's commands, re-annexing the Island and making it a County of Nova Scotia. He also, by the same Proclamation, dissolved the Council of the Island. These papers will be found in the Appendix to the Journals of 1841, No. 60.

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In the same year, the Legislature of Nova Scotia passed an Act extending to Cape Breton the laws then in force in old Nova Scotia The constitutionality of the re-annexation was afterwards called in question in the House of Assembly of Nova Scotia. In the year 1841, the question was discussed in a Committee of the Whole House, when a series of resolutions were reported, setting forth that the measure was highly expedient and advantageous to the great body of the inhabitants of the Island; that the general prosperity of the Island was advanced by the change, but offering no opinion on the constitutionality of the same, alleging that the House had not adequate information to enable them to adjudge of it.

When these resolutions were reported upon, a motion in amendment was made, confined solely to the question of constitutionality, declaring that re-annexation, under the circumstances, "could be effected only by an Act of the Imperial Parliament, adopted in compliance with the general prayer of its inhabitants, or when the safety or pressing necessities of the Empire required."

This resolution was sustained by four members only, in a House of thirty-seven, and the main resolutions, being then put, were carried with overwhelming majorities. See Journals of 1841, page 186.

This was the last occasion on which the question was raised in the Assembly. But, in 1843, a petition from certain inhabitants of Cape Breton, was lodged in the office of the Privy Council, in London, by Mr. Bliss, their solicitor, complaining of the annexation and praying for a separate Government and Legislature. A copy of this petition, and of certain correspondence between Mr. Bliss and the Colonial Office, was afterwards forwarded to the Governor of Nova Scotia, but it does not appear that any further steps, beyond the lodging of the petition, were taken in the matter; and since that period the question has never been mooted, and therefore it may be assumed that the Constitution of Nova Scotia, whatever that may be, is also the Constitution of that part of Nova Scotia which was formerly a separate Government.

I need hardly allude to the British North America Act, which takes from the Local Legislature all powers, except those contained in clause 92, nor to clause 64, which declares the Constitution of the Executive Authority in Nova Scotia, or to clause 88, that the Constitution of the

Legislature shall continue as it existed at the time of the Union, until altered by the authority of the Act; or to sub-section one of clause 92, which confers such authority on the Local Legislature,—further than to say that the power of amendment, so conferred, has not been exercised in this Province, and that the Constitution remains as it was at the time of the Union.

I have the honour to be, Sir,
Your obedient servant,

ADAMS G. ARCHIBALD,
Lieutenant-Governor.

A.

EXTRACT *from a Despatch addressed by the Lords of Plantations to Lieutenant-Governor Lawrence, dated 7th May,* 1755.

Immediately upon the receipt of your Letter, We took into consideration the observations made by the Chief Justice upon the power of the Governor and Council of Nova Scotia to pass Laws without an Assembly, and as it appeared to us to be a matter of very great consequence we transmitted those observations, together with such parts of His Majesty's Commission and Instructions as related to the passing of Laws to His Majesty's Attorney and Solicitor-General for their opinion upon this point, and having received their report, we herewith enclose to you a Copy of it for your guidance and directions; and though the calling an Assembly may in the present circumstances of the Colony be difficult and attended with some inconveniences, yet as the Attorney and Solicitor-General are of opinion, that the Governor and Council have no power to enact Laws, we cannot see how the Government can be properly carried on without such an Assembly; We desire therefore you will immediately consult with His Majesty's Chief Justice, in what manner an Assembly can be most properly convened, of what number of Members it shall consist, how those Members shall be elected, and what rules and methods of proceeding it may be necessary to prescribe for them, transmitting to us as soon as possible your opinion and report thereupon, in as full and explicit a manner as

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B.

Extract *from a Letter of the Lords of Plantations to Governor Lawrence, dated* 23*rd of March,* 1756.

We have taken into our consideration your Letter to us dated the 8th of December last, inclosing the proposals of the Chief Justice for convening an Assembly in Nova Scotia; and although we are fully sensible of the numberless difficulties which will arise in carrying this or any other plan for an Assembly into Execution in the present State of the Province, and that many of the Inconveniences pointed out in your Letter must necessarily attend it, yet we cannot but be of opinion, that the want of a proper authority in the Governor and Council to enact such Laws as must be absolutely necessary in the Administration of Civil Government, is an inconvenience and evil still greater than all these; and although His Majesty's subjects may have hitherto acquiesced in and submitted to the Ordinances of the Governor and Council, yet we can by no means think, that that or any other reason can justify the continuance of the exercise of an illegal authority; what you say with regard to the Council of Virginias passing Laws in the first infancy of that Colony is very true, but then they derived the power of doing it from their Commission, which was also the case of many others of the Colonies at their first settlement, though it was a power of very short duration, and in later times since the Constitution of this country has been restored to its true principles, has never been thought advisable to be executed.

Whether the measure proposed by the Chief Justice is or is not a proper one depends upon a precise knowledge of a variety of facts which we at this distance cannot be competent judges of; but whether that or any other plan is followed, it will only be a temporary plan, and in no degree a precedent for future Assemblies, when the circumstances of the Province will admit of other regulations. Nova Scotia.

The first Assembly convened, be it in what form it will, must necessarily consist of persons of . . . property in trade, because there is no person who can be truly said to have any considerable landed interest, until the country is cleared and the lands laid out, yet it may be proper, and it will be necessary to take care, that a certain land property, be it ever so small, be the qualification as well of the electors as the elected, because the Commission directs that the Assembly shall be chosen by the majority of the freeholders.

The election of twelve persons, or of any greater or lesser number to represent the whole Province considered as one county, may be a proper method as far as appears to us, but this must be left to your discretion, who by being upon the spot, will be better able to determine upon this point; perhaps a division of the Province into districts or townships may be the more eligible method; for although Halifax is at present the only town in which there are any inhabitants qualified to be electors, or elected, yet as it is not proposed that actual residence should be required in order to qualify a person to act in either one or other of those capacities, the making a few grants of land in any of the districts, as Minas, Chignecto, Pisiquid, Cobequid, &c., will remove this difficulty; and if this can be done, the first Assembly will bear the nearer resemblance to the form in which it must be convened when the Province becomes better peopled and settled.

This, however, we only throw out for your consideration, and . . . desire it may be understood, that this point is left to your discretion under the powers given you by your Commission.

This being settled, the next consideration will be the form of the writ of summons, the manner of executing it, and the previous points to be settled before the Assembly proceeds upon business, so far as regards the election of a Speaker, and the rules to be observed with respect to dissolutions, prorogations and adjournments; as to all which points, we must refer you to the inclosed copy of

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the form of a writ made use of in the Province of New Hampshire, which appears to us, (regard being had to the different circumstances of the two Provinces) the best adapted to the purpose, and to the inclosed copies of the instructions lately given to the Governor of Georgia, and to the Minutes of the Council of that Province, showing the manner in which these instructions were carried into execution.

There is one part of the Chief Justice's proposal, however, which we can by no means approve of, and which must be particularly guarded against, and that is the continuance of the first Assembly for three years, which might be and probably would be attended with great inconvenience; for, although we have no doubt but that the first Assembly will be constituted of proper persons, and persons well disposed to promote the public service, yet it may happen either from some defect in the first formation of the Assembly, or from their irregular and improper proceedings, that the Governor may find it necessary for the good of the Service to dissolve them, and as it would be highly improper that his hands should in such case be tied up, we thought it necessary to say this much upon this point, as it appears to us of great consequence.

Another inconvenience necessary to be guarded against is long Sessions, which will not only be attended with expense, but will also, in the present situation of affairs, greatly obstruct and hinder you in the necessary attention which you must give to other important matters: and, therefore, you will take care, the Sessions be as short as possible, and the meetings at such times as shall be most convenient as well to the Members as to yourself.

These are all the points which occur to us at present upon this important question, and it only remains for us to desire that you will take the earliest opportunity, after the first Session of the Assembly, to acquaint us in the fullest and most particular manner of all the steps you have taken in this matter, of the effect and operation of this measure with regard to the public service, pointing out to us at the same time the conveniences and inconveniences of it, how far the plan upon which you proceeded is defective, the cause of those defects, and in what manner you would propose to have them remedied, to the end that we may lay the whole matter before His Majesty, and the plan for future Assemblies.

C.

Minutes of Council of 3rd December, 1756.

At a Council holden at the Governor's House, in Halifax, on Friday, the 3rd December, 1756.

PRESENT:

His Excellency the Governor; the Lieutenant-Governor.

Benj. Green, Jno. Collier, Robt. Grant, Chas. Morris—Councillors.

Jonathan Belcher, Esquire, took the Oaths as a Member of His Majesty's Council of this Province, and his Seat at the Board.

His Excellency then communicated to the Council, some proposals which Mr. Chief Justice Belcher had laid before him the last year for calling a House of Representatives, and which he had at that time transmitted to their Lordships of the Board of Trade for their consideration. His Excellency also communicated Extracts from two Letters which he had received from their Lordships on that head, wherein they had directed him to take such measures as he should think most proper for calling such a House; wherefore he desired the Council would give him their opinion and advice thereon.

The Council then proceeded to consider what measures would be most proper to be taken for convening the Assembly, but not coming to any resolution thereon, they adjourned the further consideration thereof to Monday next, at ten of the clock in the forenoon.

(Signed)

CHARLES LAWRENCE.

JNO. DUPORT, Sec. Council.

D.

Minutes of Council, 3rd January, 1757.

At a Council holden at the Governor's House, in Halifax on Monday, the 3rd January, 1757.

PRESENT:

The Lieutenant-Governor.

Jno. Belcher, Jno Collier, Chas. Morris, Benj. Green, Robt. Grant—Councillors.

His Excellency the Governor, together with His Majesty's Council, having had under mature consideration the necessary and most expedient measures for carrying into execution those parts of His Majesty's Commission and Instructions which relate to the calling General Assemblies within the Province, came to the following resolutions thereon, viz.:—

That a House of Representatives of the inhabitants of this Province be the Civil Legislature thereof, in conjunction with His Majesty's Governor or Commander-in-Chief for the time being, and His Majesty's Council of the said Province, the first House to be elected and convened in the following manner, and to be styled the General Assembly, viz.:—

That there shall be elected for the Province at large until the same shall be divided into Counties	12	members.
For the Township of Halifax	4	"
For the Township of Lunenburg	2	"
For the Township of Dartmouth	1	"
For the Township of Lawrence Town	1	"
For the Township of Annapolis Royal	1	"
For the Township of Cumberland	1	"
	22	

That until the said townships can be more particularly described, the limits thereof shall be deemed to be as follows, viz.:—

That the Township of Halifax comprehend all the land southerly of a line extending from the westermost head of Bedford Basin across to the northeasterly head of St.

Margaret's Bay, with all the Islands nearest to said lands, together with the islands called Cornwallis's, Webb's and Rous's Islands. NOVA SCOTIA.

That the Township of Lunenburg comprehend all the lands lying between Lahave River and the eastermost head of Mahone Bay, with all the islands within said Bay, and all the islands within Mirliguash Bay, and those islands lying to the southward of the above limits.

That the Township of Dartmouth comprehend all the lands lying on the east side of the Harbour of Halifax and Bedford Basin, and extending and bounded easterly by the grant to the proprietors of Lawrencetown, and extending from the northerly head of Bedford Basin into the country, until one hundred thousand acres be comprehended.

That the Township of Lawrencetown be bounded on the ocean according to the limits of the grant to the proprietors, and thence under the same lines to extend into the country, till one hundred thousand acres be comprehended.

That the Township of Annapolis Royal be bounded northerly by the Bay of Fundy, and comprehend all the lands from the entrance of the bason, to extend up the river as far as the late French Inhabitants have possessed, and all the lands on the south side of the bason and river of Annapolis, under the same limits east and west, and to extend southerly till one hundred thousand acres be comprehended.

That the Township of Cumberland, in the District of Chignecto, comprehend all the lands lying between the Bason formerly called Beaubassin, now called Cumberland bason, and the Bay Verte, and all those lands lying within seven miles of the southwestward and northwestward of the road leading from said bason to said Bay.

That when twenty-five qualified electors shall be settled at Pisiquid, Minas, Cobequid, or any other Townships which may hereafter be erected, each of the said Townships so settled shall, for their encouragement, be entitled to send one Representative to the General Assembly, and shall likewise have a right of voting in the Election of Representatives for the Province at large.

That the House shall always consist of at least sixteen Members present besides the Speaker, before they enter upon business.

That no person shall be chosen as a Member of the said

Nova Scotia. House, or shall have a right of voting in the election of any Member of the said House, who shall be a Popish Recusant, or shall be under the age of twenty-one years, or who shall not at the time of such election, be possessed in his own right, of a Freehold Estate within the district for which he shall be elected, or shall so vote, nor shall any Elector have more than one vote for each member to be chosen for the Province at large, or for any Township; and that each Freeholder present at such election, and giving his vote for one member of the Province at large, shall be obliged to vote also for the other eleven.

That respecting Freeholds which may have been conveyed by the Sheriff, by virtue of an execution, the right of voting shall remain and be in the persons from whom the same were taken in execution, until the time of redemption be elapsed.

That no non-commissioned officer or private soldier in actual service, shall have a right of voting by virtue of any dwelling built upon sufferance, nor any possession of Freehold, unless the same be registered to him.

That all the Electors shall, if so required at the time of the election, take the usual State Oaths appointed by law, and declare and subscribe the test.

That any Voter shall at the request of any Candidate, be obliged to take the following Oaths, which Oaths, together with the State Oaths, the Returning Officer is hereby empowered to administer.

"I, A. B., do swear that I am a Freeholder in the Township of , in the Province of Nova Scotia, and have Freehold Lands or Hereditaments lying or being at , within the said Township, and that such Freehold Estate hath not been made or granted to me fraudulently on purpose to qualify me to give my vote, and that I have not received or had by myself, or any person whatsoever in trust for me, or for my use and benefit, directly or indirectly, any sum or sums of money, office, place or employment, gift or reward, or any promise or security for any money, office, employment or gift, in order to give my Vote at this Election, and that I have not before been polled at this Election, and that the place of my abode is at ."

That a Precept be issued by His Excellency the Governor to the Provost Marshal or Sheriff of the Province, requiring him, by himself or his Deputies, to summon the Freeholders of the Province to meet within their respec-

tive Districts at some convenient place and time, to be by the said Provost Marshal or any one of his Deputies appointed, and of which he or they shall give twenty days notice, then and there to elect (agreeable to the Regulations hereby prescribed) such a number of Representatives, as shall in the said Precept be expressed, agreeable to the preceding detail.

That, on account of the present rigorous season, the Precept for convening the first Assembly be made returnable in sixty days from the date thereof, at which time the Assembly shall meet at such place as His Excellency the Governor shall appoint in the Precept.

That the Provost Marshal or his Deputy shall be the Returning Officer of the Elections to be held by him with the assistance of three of the Freeholders present, to be appointed and sworn by the Returning Officer for that purpose, and in case a Scrutiny shall be demanded, the same shall be made by them, and in case of further contest, the same to be determined by the House, the Poll for each Township to be closed at the expiration of forty-eight hours from the time of its being opened; and for the Province at large, the Poll, after four days from the time of its being opened for the Election, shall be sealed up by the Returning Officer for each Township, and transmitted to the Provost Marshal by the first opportunity, that seasonable notice may be given to the persons who shall, upon examination, appear to have been chosen by the greatest number of the said votes. Provided, nevertheless, that if the votes in the Townships of Annapolis Royal and Cumberland, for the first Members for the Province at large, shall not be returned eight days before the expiration of the time limited for returning the Precept, the Provost Marshall shall, in such case, proceed to declare who are the persons elected, from the other votes in his hands.

That the Provost Marshal or his Deputy, shall appoint for each candidate, such one person as shall be nominated to him by each candidate, to be inspectors of the Returning Officer and his assistants.

That no person shall be deemed duly elected, who shall not have the votes of the majority of the Electors present.

That the names of all persons voted for, together with the names of the Voters, shall at the time of voting, be publicly declared, and entered on a book kept for that purpose.

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That in case of the absence of any of the Members from the Province for the term of two months, it shall and may be lawful for the Governor, Lieutenant-Governor, or Commander-in-Chief (if he shall judge it necessary), to issue his Precept for the choice of others in their stead.

The Returning Officer shall cause the foregoing resolutions to be publicly read at the opening of each meeting for the elections, and to govern the said meetings agreeably thereto.

(Signed,) Chas Lawrence.

Jno. Duport, Sec. Council.

E.

Extract *from a Letter of the Lords of Plantations, to Governor Lawrence, dated 7th February*, 1758.

We have fully considered that part of your letter, which relates to the calling an Assembly, and also the plan for that purpose, contained in the Minutes of the Council transmitted with it; and having so often and so fully repeated to you our sense and opinion of the propriety and necessity of this measure taking place, it now only remains for us to direct its being carried into immediate execution; that His Majesty's subjects, (great part of whom are alleged to have quitted the Province on account of the great discontent prevailing for want of an Assembly,) may no longer be deprived of that privilege, which was promised to them by His Majesty, when the settlement of this Colony was first undertaken, and was one of the conditions upon which they accepted the proposals then made.

We are sensible that the execution of this measure may in the situation of the Colony be attended with many difficulties, and possibly may, in its consequences, in some respects interfere with and probably embarrass His Majesty's Service; but without regard to these considerations, or to what may be the opinion of individuals with respect to this measure, we think it of indispensable necessity that it should be immediately carried into execution.

We approve in general that part of your plan which establishes townships, and ascertains their limits, as cor-

responding with the plan laid down in the instructions given to Mr. Cornwallis at the first settlement of the colony; but we do not think it advisable that any of those townships which has not fifty settled families, should be allowed to send Representatives to the Assembly; and, therefore, we would propose that, for the present, those only which have that number of settled families should have that privilege, and that the rest of the members, computing the whole at twenty-two, should be elected for the Province at large, considered as one county, according to the plan agreed upon; but that whenever any of these townships which are now established, or any others which may be hereafter established, shall contain fifty settled families, they shall be entitled to a writ for electing two Representatives, and the number of the Members for the whole Province at large, considered as one county, shall be diminished in proportion. Nova Scotia.

As to the other parts of your plan, they do not appear to us liable to objection, excepting only that part which establishes the quorum of the Assembly, and fixes it at seventeen, which we apprehend to be too great a proportion of the whole; and that it ought not, at the most, to exceed one-half of the whole number, which is more agreeable to what has been judged to be proper in cases of other American Assemblies, where great inconveniences have been found to result from the quorum of the Assembly being too great a proportion of the whole.

With respect to the time which it may be proper to fix for the return of the writs, we could wish that you should conform yourself to what has been the general rule in cases of the like kind in other colonies, so far as the situation and circumstances of Nova Scotia will admit of it. What this rule has been we are not at present sufficiently apprized, but of which you will be able to inform yourself from the many persons now in Nova Scotia who have come from other colonies, and are doubtless well acquainted with what has been the custom in this case. But whatever this rule may be, or however short the term (and we apprehend the shorter it is the better, provided it leaves sufficient time for the due execution of the writs), no great inconveniences can arise from it, because it will be in your power, whatever day may be fixed by the writs for the Assembly's meeting, to postpone it to some further day by a Proclamation of Prorogue, in case you shall find that it will interfere with any particular services which

Nova Scotia. yourself or the Lieutenant-Governor may be employed in, and which must necessarily prevent their proceeding upon business.

F.

EXTRACT *from Lord Glenelg's despatch of the 30th April, 1837, touching separation of Legislative and Executive Councils.*

DOWNING STREET, 30th April, 1837.

SIR,—I have received your despatch of the 9th of March, in which you transmitted to me a report of the proceedings of the Legislature of Nova Scotia since their meeting on the 21st of last January.

It is a ground of sincere satisfaction to me that the House of Assembly rescinded the resolutions which they adopted on the state of the Province, and I am happy to perceive, on reference to the Journals of the House, that the resolutions are rescinded on the motion of the same gentleman who had originally proposed them for the adoption of the House.

Hitherto mutual confidence has reigned, almost without interruption, between His Majesty's Government and the Representatives of the people of Nova Scotia, and I should deeply have regretted to be required to participate in a discussion conducted on either side in a different spirit. I hasten therefore, to obviate, if possible, any such controversy, and to place you in possession of instructions for your guidance on the questions embraced in those resolutions.

It is the more incumbent on me to adopt this course, because you prepare me, not indeed for the immediate revival of all the topics, the discussion of which had been suspended, but for an intimation of the desire of the Assembly for some alteration in the form of their existing constitution.

I am happy to assure you that His Majesty, in acceding with the wishes, or what he conceives to be the wishes, of the Assembly, makes no reluctant concession, but meets them with a cheerful assent, convinced that the greater part of the measures which they have suggested will be conducive alike to the honour of his Crown and the welfare of his faithful subjects inhabiting that part of his dominion.

1st. His Majesty abstains from expressing any opinion on the questions debated between the two Houses of Provincial Legislature with regard to the disuse of divine worship in the one and the exclusion of the public from the debates of the other. The King is persuaded that the very grave importance of these measures will be duly appreciated by either House, and that the interference of the Executive Government on such subjects would not only be misplaced but injurious, as it could not fail to be regarded, and justly, as an encroachment on the peculiar privileges of the Legislature.

2nd. You give me reason to infer that the Assembly desire such a change in the constitution of the Legislative Council, as would bring it into correspondence with the system at present in force in the Canadas and in New Brunswick. It is of course understood in the Province that in all the British Colonies possessing Representative Assemblies, except the Canadas and New Brunswick, the Council is a single Chamber, called at different times to the discharge of the Legislative functions, and to the duty of assisting in the administration of the Executive Government.

The separating this body into two distinct Chambers, the one Legislative and the other Executive, is an experiment which was first tried in the Canadas by the Act of 1791, and repeated in New Brunswick in the year 1832. So far as I have been able to judge the result of this innovation has not been such as to exclude very serious doubts respecting its real usefulness.

It may well be questioned whether the maintenance of the existing constitution of the Council of Nova Scotia would not be the best mode of subjecting that body to a direct and effective responsibility, and of securing to each of the two Houses of the Legislature its just weight and legitimate influence in the deliberations and measures of the other.

His Majesty, however, is graciously prepared to act on this question in conformity with such advice as shall be deliberately tendered to him by the Representatives of the people of Nova Scotia, because the King will not refuse to his people in that Province every participation in the institutions of the other Provinces of British North America, which their Representatives may regard as conducive to the general good, and because His Majesty is convinced that their advice will be dictated by more exact

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and abundant knowledge of the wants and wishes of their constituents than any other persons possess or could venture to claim.

I willingly abstain from entering on the discussion of the alternative of an Elective Council, suggested in one of the rescinded resolutions. It is unnecessary for me to say more on this subject than to express my conviction that the suggestion was thrown out by the Assembly rather as a possible compromise of a supposed difficulty, than as expressing any fixed opinion, that the evils of which they complained could be remedied only by so essential a change in the Constitution.

M.

Copy *of Commission to Sir Peregrine Maitland, 3rd August, 1828.*

George R.

George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To Our Trusty and Well-beloved Sir Peregrine Maitland, Knight, Commander of the Most Honourable Military Order of the Bath, Major-General of Our Forces:— Greeting:

We, reposing especial trust and confidence in your loyalty, integrity and ability, do by these presents constitute and appoint you to be our Lieutenant-Governor of Our Province of Nova Scotia, in the room of Lieutenant-General Sir James Kempt, to have, hold, exercise, and enjoy the said office and place during Our pleasure, with all rights, privileges, profits, perquisites, and advantages to the same belonging and appertaining. And, further, in case of the death, or during the absence of our Captain-General and Governor-in-Chief of our Province of Nova Scotia, now and for the time being, we do hereby authorize and require you to execute and perform all and singular the powers and directions contained in our Commission to our said Captain-General and Governor-in-Chief, according to such instructions as he hath already received from us, and such further orders and instructions as he or

you shall hereafter receive from us. And we do hereby command all and singular our Officers, Ministers, and loving subjects, in our said Province, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at our Court at Windsor, the twenty-third day of August, 1828, in the ninth year of Our reign.

By His Majesty's Command,

GEORGE MURRAY.

Major-General Sir PEREGRINE MAITLAND,
Lieutenant-Governor of the Province of Nova Scotia.

N.

COPY *of Commission to Sir Colin Campbell, 24th January, 1834.*

WILLIAM R.

WILLIAM THE FOURTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To Our Trusted and Well-beloved Sir Colin Campbell, Knight, Commander of the Most Honourable Military Order of the Bath, Major-General of Our Forces :— Greeting :

We, reposing especial trust and confidence in your loyalty, integrity and ability, do, by these presents, constitute and appoint you to be Our Lieutenant-Governor of Our Province of Nova Scotia in America ; to have, hold, exercise and enjoy the said office and place during Our pleasure, with all the rights, privileges, profits, perquisites and advantages to the same belonging and appertaining ; and further, in case of the death, or during the absence, of Our Captain-General and Governor-in-Chief of Our Province of Nova Scotia, now, and for the time being, We do hereby authorize and require you to execute and perform all and singular the powers and directions contained in the Commission to Our said Captain-General and Governor-in-Chief, according to such instructions as he hath already received from Us, and such further orders and instructions as he or you shall hereafter receive from Us. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Pro-

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vince, and all others whom it may concern, to take due notice thereof, and to give their ready obedience accordingly.

Given at Our Court at St. James's, the 24th day of January, 1834, in the fourth year of Our reign.

By His Majesty's command,

E. G. Stanley.

Major-General Sir Colin Campbell,
Lieutenant-Governor, Nova Scotia.

O.

Royal Instructions.

List among Nova Scotia Archives.

No. 1.—Instructions to Richard Phillips, Esq., Governor-in-Chief, Nova Scotia, dated 1st July, 1729, containing 32 clauses. Instructions relative to Trade and Plantations, containing 21 clauses.

No. 2.—Instructions to Peregrine Thomas Hopson, Governor-in-Chief, etc., dated 7th May, 1752, containing 132 clauses. Trade and Plantations, containing 23 clauses. *(Not printed.)*

No. 3.—Instructions to Charles Lawrence, Governor-in-Chief, etc., dated 18th March, 1756, containing 124 clauses. Trade and Plantations, containing 26 clauses.

No. 4.—Instructions to Montague Wilmot, Governor-in-Chief, Nova Scotia, dated 16th March, 1764, containing 97 clauses. Trade and Plantations, containing 26 clauses.

No. 5.—Instructions to Francis Legge, Governor-in-Chief, Nova Scotia, dated 3rd August, 1775, containing 81 clauses. Those referring to Trade and Plantations not among Archives. *(Not printed.)*

No. 6.—Instructions to Sir Edmund Walker Head, Governor-General, etc., dated 20th September, 1854, contains 35 clauses. (See Journals of Assembly for 1859; No. 28 of Appendix, p. 427) *(Not printed.)*

No. 7.—Instructions to Lord Monck, Governor-General, etc,, dated 2nd November, 1861, contains 15 clauses. *(Not printed.)*

No. 8.—Instructions to Sir John Henry Craig, dated 29th August, 1797, contains 19 clauses. *(Not printed.)*

No. 9.—Instructions to Sir George Prevost, Governor of Nova Scotia, Cape Breton and Prince Edward Island, dated 27th October, 1811, contains 70 clauses. (*Not printed*).

No. 10.—Instructions to the Earl of Dalhousie, Governor of Nova Scotia, Prince Edward Island and Cape Breton, dated 27th April, 1820, contains 70 clauses: additional instructions, 14 clauses. (*Not printed*).

No. 11.—Instructions to the Earl of Durham, Governor-General, etc., dated 6th February, 1838, contains 41 clauses; additional instructions to appoint certain persons Executive Councillors. *(Part only printed in this Appendix.)*

No. 12.—Instructions to Charles Poulett Thompson, Governor-General, dated 7th September, 1839. (Verbatim, same as to Earl Durham, No. 11.) (*Not printed*)

No. 13.—Instructions to Sir Charles Bagot, Governor-General, etc., dated 7th October, 1841. (Verbatim, same as to Earl Durham, No. 11.) (*Not printed.*

P.

By *Her Majesty the Queen, Guardian of the Kingdom, etc.*

Instructions for Richard Phillips, Esq., Captain-General and Governor-in-Chief of Nova Scotia.

Caroline, R. C. R.

Instructions for Richard Phillips, Esq., His Majesty's Captain-General and Governor-in-Chief, in and over His Majesty's Province of Nova Scotia, or Acadie in America. Given at the Court at Kensington, the first day of July, 1729, in the third year of His Majesty's Reign.

1st. With these, His Majesty's instructions, you will receive His Commission under the Great Seal of Great Britain, constituting you His Majesty's Captain-General and Governor-in-Chief, in and over His Majesty's Province of Nova Scotia, or Acadie in America.

2nd. You are therefore to fit yourself with all convenient speed and to repair to His Majesty's said Province,

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where, being arrived, you are to take upon you the execution of the trust reposed in you, and as soon as may be, to call together the persons whom you are empowered by your Commission to appoint as Councillors there, and before them to publish His Majesty's said Commission, and take yourself, and afterwards administer to the said Councillors the oaths therein mentioned.

3rd. You are to send to His Majesty, by one of His principal Secretaries of State, and to His Commissioners for Trade and Plantations, the names and characters of such persons as shall be appointed by you of the said Council, to whom you shall allow freedom of debate and vote in all affairs of public concern that may be debated in Council.

4th. You are neither to augment nor diminish the number of the said Council, nor suspend any of the members thereof, without good and sufficient cause, which you are to signify to His Majesty, and to His Commissioners for Trade and Plantations, as aforesaid.

5th. But you are to signify His Majesty's pleasure unto the members of His said Council, that if any of them shall absent themselves from the Province, and continue absent above the space of twelve months together, without leave from you, or from His Majesty's Governor, or Commander-in-Chief of the said Province for the time being, first obtained, under your or his hand and seal, or shall remain absent for the space of two years, or the greatest part thereof, successively, without His Majesty's leave, given them under His Royal Sign Manual, their place or places in the said Council shall immediately thereupon become void; and that His Majesty will forthwith appoint others in their stead.

6th. And whereas His Majesty is sensible that effectual care ought to be taken to oblige the members of His said Council to a due attendance therein, in order to prevent the many inconveniences that may happen from the want of a quorum of the Council to transact business, as occasion may require; it is His Majesty's will and pleasure that if any of the said members shall wilfully absent themselves when duly summoned, without a just and lawful cause, and shall persist therein, after admonition, you suspend the said Councillors so absenting themselves 'till His Majesty's further pleasure be known, giving His Majesty timely notice thereof; and that this be signified to the several members of His Majesty's Council, and entered on the Council books as a standing rule.

7th. And that His Majesty may be always informed of the names and characters of persons fit to supply the vacancies which shall happen in the said Council, you are to transmit unto His Majesty, by one of His principal Secretaries of State, and to His Commissioners for Trade and Plantations, with all convenient speed, the names and characters of twelve persons, inhabitants of the said Province, whom you shall esteem the best qualified for that trust: and so, from time to time, when any of them shall die, depart out of the said Province, or become other ways unfit, you are to nominate so many other persons to His Majesty in their stead, that the list of twelve persons fit to supply vacancies in His Majesty's said Council may be always complete.

8th. But you shall not take upon you to fill up any vacancies that may happen in the said Council, after the same shall be constituted as aforesaid, without His Majesty's leave first obtained, unless the number of Councillors remaining in your Government be under seven, and in that case you are only to complete them to the number of seven and no more.

9th. And the better to enable His Majesty to complete what may be further wanting towards the establishing a Civil Government in the said Province, you are to give unto His Majesty, by one of His principal Secretaries of State, and to His Commissioners for Trade and Plantations, by the first opportunity after your arrival there, a true state of the said Province, particularly with respect to the number and qualifications of the people, that either are there or hereafter shall resort thither, of what number it may be proper to constitute an Assembly, what persons are proper and fit to be Judges, Justices, or Sheriffs; and any other matter or thing, that may be of use to His Majesty in the establishing a Civil Government, as aforesaid.

10th. In the meantime, till such a Government shall have been established, you will receive herewith a copy of the instructions given by His Majesty to His Governor of Virginia, by which you will conduct yourself till His further pleasure shall be known, as near as the circumstances of the place will admit, in such things as they can be applicable to, and where you are not otherwise directed by these instructions; but you are not to take upon you to enact any laws till His Majesty shall have appointed an Assembly, and given you directions for your proceedings therein.

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11th. Whereas His Majesty is informed that the inhabitants of Nova Scotia (except those of the garrison of Annapolis Royal) are most, if not all of them French, who never took the oath of fidelity and allegiance to His Majesty, to His late Royal Father, or to the late Queen; notwithstanding such, their undutiful behaviour, you are immediately upon your arrival there, to invite them in the most friendly manner by proclamation, and otherways, as you shall think fit, to submit to your Government and swear allegiance to His Majesty within the space of four months from the date of such, your proclamation, upon which condition they shall enjoy the free exercise of their religion, and be protected in all their civil and religious rights and liberties so long as they shall behave themselves as becomes good subjects.

12th. You shall take care to give notice to His Majesty, by one of His principal Secretaries of State, and to His Commissioners for Trade and Plantations, of the effect of this Proclamation, and expect His Majesty's further orders thereupon for your conduct towards such of the said French inhabitants as shall not have complied therewith by the time therein prefixed. But, in the meanwhile, you are to observe that the said French inhabitants of Nova Scotia have long since lapsed the time granted them by the Treaty of Utrecht for removing their effects from thence to any part of the French dominions in America; and, therefore, if any of the said French inhabitants should, notwithstanding the encouragement given them to become good subjects to His Majesty, resolve to remove out of your Government, you are to take particular care, as far as in you lies, that they do no damage before such their removal to their respective houses and plantations, and that they be not permitted to carry off their effects with them.

13th. And as it is not reasonable that such of the French inhabitants as shall neglect or refuse to take the oaths of allegiance aforesaid within the time prefixed, should enjoy the same liberties and advantages with the rest of His Majesty's subjects in Nova Scotia, you are hereby directed to debar them from fishing on the coast till His Majesty's further pleasure be known concerning them.

14th. You are to send to His Majesty, by one of His principal Secretaries of State, and to His Commissioners for Trade and Plantations, an account of the number of

the said French inhabitants remaining in that Province, where their settlements are, whether they live in townships or are scattered in distances from each other; what trade they carry on, either with the Indians or otherways, and how they employ themselves for the subsistence of their families; what number of ships they have, and how they are employed; to what market they carry the fish they catch, and what goods or commodities they bring back (and from what places) in return for their said fish. Also, the like account with respect to such of His Majesty's natural born subjects as are already settled in His said Province. Nova Scotia.

15th. You shall, after your arrival there, propose to the Governor of Canada to appoint one or more Commissaries in behalf of the French, to be joined with such as you shall appoint on His Majesty's part, to view the limits between His Majesty's Territories and those of France, bordering on Nova Scotia, pursuant to the Articles of the Treaty of Utrecht, and to such further instructions as you shall receive from hence for that purpose. And you shall send a full account of your proceedings herein to one of His Majesty's principal Secretaries of State, to be laid before His Majesty, and to His Commissioners for Trade and Plantations, as aforesaid, with your opinion upon the whole.

16th. You shall live in good correspondence with the said Governor, and all other officers and subjects of the most Christian King, taking particular care that no violence be offered to them, whereby an occasion might be given to interrupt the friendship and good correspondence between the two Crowns, which, more particularly in the present juncture, is so necessary for their mutual advantage; and in case the subjects of France should make any depredations upon His Majesty's subjects, or do them any other injury, you shall not make reprisals without further orders from His Majesty, but you shall in an amicable manner demand redress of the Governor of Canada, or such other officer as it may concern; but if it should so happen that he persist in justifying what such subjects of France may have done, and that either through his obstinacy, or the dubiousness of the case, you shall not be able to adjust the difference between yourselves in a friendly manner, you shall represent the same to one of His Majesty's principal Secretaries of State, and to his Commissioners for Trade and Plantations, to be laid before him, acquainting

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the said Governor, or other officer in the first place with your intention so to do, and offering to impart to him your representation of the case, if he will in like manner communicate to you what he writes to the French Court upon that subject.

17th. You are, notwithstanding, to keep as strict a watch as possible upon the proceedings of the French at Cape Breton and in Canada, and particularly you are to send to His Majesty by one of his Secretaries of State and to his Commissioners for Trade and Plantations, frequent accounts of their number, strength and situation, what commerce they carry on, and what progress they have made in their settlement on the back of the British plantations, especially with regard to the communication they are said to have opened from the Gulf and River of St. Lawrence to the Lakes of Ontario and Erie, and from thence down the River Mississippi to the Bay of Mexico.

18th. You shall to the utmost of your power encourage the growth and production of timber, masts, tar, hemp, and other naval stores in the Province of Nova Scotia; and you are to enquire what trees there are in the said Province fit for masts for the use of the Royal Navy; and in what parts of the country they grow, at what distance they are from any rivers, whereby they may be the more commodiously brought down in order to be shipped for this kingdom.

19th. And you are in a particular manner to signify His Majesty's express will and pleasure to all the inhabitants that now are or hereafter shall come to settle there, and to take care yourself that no trees fit for masts for the future, of the diameter of twenty-four inches and upwards at twelve inches from the ground, be cut without His Majesty's particular license.

20th. And whereas His Majesty has been graciously pleased to constitute and appoint a Surveyor-General of his woods in North America, with proper deputies under him, in order the better to secure and preserve for the use of His Royal Navy such trees as shall be found proper for that service. It is His Majesty's will and pleasure that you be aiding and assisting to the said Surveyor and his deputies, and that you give orders to all officers, civil and military, that they in their several stations and places be aiding and assisting to the said Surveyor or his deputies in preventing the destruction of His Majesty's woods in that Province, or in punishing such as shall be found offending therein.

21st. You are to endeavour to get a survey made of His Majesty's said Province of Nova Scotia, as soon as conveniently may be, and in the meantime you are to send to His Majesty by one of his principal Secretaries of State, and to his Commissioners for Trade and Plantations, the best description of that country you are able to get, with relation to its extent and situation, with respect to the neighbouring French of Canada and Cape Breton. Nova Scotia.

22nd. You are also to send the most particular account you can, of the nature of the soil, what swamps there are in it; and whether those swamps do produce mast trees, or by draining may not be made fit for raising of hemp; what other products the country is capable of, and how the same may be best improved for the advantage of this kingdom; and what trade may be carried on with the Indians for furs or otherwise; what navigable rivers there are in the said Province, and what others fall into them.

23rd. And whereas His Majesty has judged it highly necessary for His service, that you should cultivate and maintain a strict friendship and good correspondence with the Indian nations inhabiting within the precincts of your Government, that they may be reduced by degrees, not only to be good neighbours to His subjects, but likewise themselves become good subjects to His Majesty; His Majesty does therefore direct you upon your arrival in Nova Scotia, to send for the several heads of the said Indian nations or clans and promise them friendship and protection on His part. You will likewise bestow on them as your discretion shall direct, such presents as you shall carry from hence in His Majesty's name for their use.

24th. And as a further mark of His Majesty's goodwill to the said Indian nations, you shall give all possible encouragement to intermarriages between His Majesty's British subjects and them, for which purpose you are to declare in His Majesty's name that he will bestow on every white man, being one of his said subjects, who shall marry an Indian woman, native and inhabitant of Nova Scotia, a free gift of the sum of ten pounds sterling and fifty acres of land free of quit rent for the space of twenty years, and the like on any white woman, being His Majesty's subjects, who shall marry an Indian man, native and inhabitant of Nova Scotia, as aforesaid.

25th. And whereas it will be of advantage to His Majesty's service, and highly beneficial to the trade of Great Britain that His Majesty's said Province of Nova

Nova Scotia. Scotia be peopled and settled as soon as conveniently may be; as an encouragement to all His Majesty's good subjects that shall be disposed to settle themselves and their families there, you are hereby directed to make grants of such lands in fee simple as are not already disposed of by His Majesty to any person that shall apply to you for the same, reserving, nevertheless, to His Majesty, His heirs and successors an annual rent of one shilling, or of three pounds of hemp clean, bright and water rotted for every fifty acres so granted, at the election of the grantee, the said rent to commence three years after the making the grant, and not before. You are to take special care that there be a clause inserted in all the said grants declaring that if any grantee shall refuse or neglect to pay the above-mentioned rent for the space of three years, after the same shall become due, his patent shall thenceforth be null and void to all intents and purposes whatsoever.

26th. But as great inconveniences have arisen from suffering one single proprietor to possess too large tract of lands in His Majesty's plantations, it is His Majesty's express will and pleasure that for the better settling and peopling the colony under your government you do not upon any pretence whatever grant unto any one person above the number of five hundred acres, it being His Majesty's intention that no person whatsoever, either in his own name, or any others in trust for him, do hold any more than five hundred acres as aforesaid until His Majesty's further pleasure shall be known thereupon; and in all such grants of land as you shall hereafter make, you are to have particular regard to the profitable and unprofitable acres, that is to say that no man shall have his whole grant run lengthways upon the banks of a river, but that a due proportion of what shall be granted to him do run from the river upwards into the country.

27th. And whereas it is, and hath been, a common practice in His Majesty's Plantations in America, for persons to take out patents for sundry tracts of land without being in any condition to cultivate the same; you are hereby directed to cause a clause to be inserted in every grant of land by you to be made as aforesaid, whereby the said grant shall become void and null, to all intents and purposes, if the grantee or his assigns, do not cultivate, enclose, plant or improve at least one-tenth part of the lands granted within the space of three years, to be accounted from the date of the patent, and so progres-

sively one other tenth part within the space of every other subsequent three years until the whole tract of land contained in the said patents shall be cultivated, enclosed, planted or improved.

28th. And that His Majesty may at all times be exactly informed of the state of his said Province, particularly with respect to the lands that shall be granted, you are to cause a book to be fairly kept, wherein shall be registered all the grants made by you, specifying the names of the grantees, the number of acres granted, with their situation and boundaries, and the quit rent thereon reserved, together with the date of each respective grant; and you are to transmit to His Majesty, by one of His principal Secretaries of State and to His Commissioners for Trade and Plantations, transcripts of such registers, at least once a year.

29th. But as it is His Majesty's pleasure that certain tracts of land, which shall be found upon a survey to be most proper for producing of masts and other timber for the use of His Majesty's Royal Navy, lying contiguous to the sea coasts or navigable rivers, be reserved for his service, you are not to grant any lands till such tracts shall have been marked out and set apart for his use, not amounting to less than two hundred thousand acres in the whole, in which you shall strictly forbid all the inhabitants of Nova Scotia, or others that may come there, to cut any trees, of any dimensions whatsoever, upon pain of His Majesty's highest displeasure, and of the utmost penalties the law can inflict.

30th. It being His Majesty's intention to give all possible encouragement to the trade of all his subjects, you are to use your best endeavours that the fishery on the coast of Nova Scotia be encouraged and protected, and in order thereunto, you shall not allow any settlements to be made on the coast but what shall be at two hundred yards distance from the sea or harbour, that there may be sufficient room left for beaches, flakes, stages, cook-rooms, and other necessary conveniences, between the said settlements and the sea, for any of His Majesty's subjects that shall come to catch and cure fish there, who are not to be impeded, molested, or disturbed in their curing their fish, upon any pretence of grants or settlements upon the coast; nor shall any of the planters and inhabitants demand any sum or sums of money, or other acknowledgment, from the fishermen, for the liberty of curing upon the coast,

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unless they provide stages and cook-rooms, with a shoreman to each stage, and the usual necessaries for such fishing ships, as is done at Marble Head, in New England, and in such case they shall ask no more than 12d., New England money, for every quintal.

31st. And to render the commerce of His Majesty's subjects in Nova Scotia more commodious and practicable, you are to take especial care in all such grants of land as you shall make, pursuant to your commission and these instructions, that a continued space of land on the banks of all creeks and rivers, of the breadth of one hundred yards, be reserved free and common to all passengers, and public uses whatsoever.

32nd. Whereas there have been great complaints that His Majesty's soldiers, in garrison at Annapolis, have been very ill-treated with regard to their clothing and provisions, and in several other respects, you shall make particular inquiry into any abuses of this kind that may have been heretofore, and transmit an account thereof to His Majesty's Secretary at War; and you shall take care that no occasion be given hereafter for complaints of this nature.

C. R. C. F.

Q.

Instructions *to Charles Lawrence, Esq., Captain-General and Governor-in-Chief of Nova Scotia.*

George R.

Instructions to our trusty and well-beloved Charles Lawrence, Esq., our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia, or Accadia in America, given at our Court at St. James's, the 18th day of March, 1756, in the 29th year of Our Reign.

11. And in case you shall find it necessary for our service to call an Assembly within Our said Province, you shall take care the Members thereof be elected only by the freeholders as being more agreeable to the custom of this Kingdom.

QQ.

Instructions *to Governor Wilmot.*

George R.

Instructions to our trusty and well-beloved Montagu Wilmot, Esq., our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia and the islands and territories thereunto belonging in America. Given at Our Court at St. James, the sixteenth day of March, 1764, in the fourth year of Our Reign.

1. With these Our instructions you will receive Our Commission under Our Great Seal of Great Britain, constituting you Our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia, and the islands and territories thereunto belonging in America. You are therefore to take upon you the execution of the place and trust we have reposed in you, and the administration of the Government, and to do and execute all things in due manner that shall belong unto your command, according to the several powers and authorities of Our said Commission under Our Great Seal of Great Britain, and these Our instructions to you, or such further powers and instructions as shall at any time hereafter be granted or appointed you, under Our signet and sign manual, or by Our order in Our Privy Council; and you are forthwith to call together the following persons, whom we do hereby appoint to be Our Council for Our Province of Nova Scotia, viz.:—Jonathan Belcher, Our Chief Justice of Our said Province, Benjamin Greene, John Collier, Charles Morris, Richard Bulkley, Joseph Guerish, Alexander Grant, Edmund Crawley, Henry Newton, Michael Franklyn, and Sebastian Zouberbuhler. It is, nevertheless, Our will and pleasure that Our said Chief Justice, or the Chief Justice for the time being, shall be capable of taking upon him the administration of the Government upon your death or absence, or the death or absence of the Commander-in-Chief of Our said Province for the time being.

2. And you are with all due and usual solemnity to cause Our said Commission to be read and published at the said meeting of Our Council; which being done, you shall then take and also administer unto each of the members of Our said Council, the oaths mentioned in an Act

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passed in the first year of the reign of His Majesty King George the First, intituled: "An Act for the further security of His Majesty's Person and Government, and the succession of the Crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors;" as also make and subscribe, and cause the members of the said Council to make and subscribe the declaration mentioned in an Act of Parliament made in the twenty-fifth year of the reign of King Charles the Second, intituled: "An Act for Preventing Dangers which may happen from Popish Recusants;" and you and every of them are likewise to take an oath for the due execution of your and their places and trusts, with regard to your and their equal and impartial administration of justice; and you are also to take the oaths required by an Act passed in the seventh and eighth years of the reign of King William the Third, to be taken by Governors of Plantations to do their utmost that the laws relating to the plantations be duly observed.

3. You shall administer or cause to be administered the oaths appointed in the aforesaid Act, intituled: "An Act for the further security of His Majesty's Person and Government, and the succession of the Crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors," to the members and officers of the Council and Assembly, and to all Judges, Justices and other persons, that hold any office or place of trust or profit in the said Province, whether by virtue of any patent under the Great Seal of Great Britain, or the Public Seal of Nova Scotia, or otherwise; and you shall also cause them to make and subscribe the aforesaid declaration; without the doing of all which, you are not to admit any person whatsoever into any public office, nor suffer those that shall have been admitted to continue therein.

4. And that We may always be informed of the names and characters of persons fit to supply the vacancies which shall happen in our said Council you are to transmit to Our Commissioners for Trade and Plantations, in order to be laid before Us, the names and characters of three persons, inhabitants of our colony, whom you shall esteem the best qualified for that trust.

5. Whereas, by Our Commission to you, you are em-

powered, in case of the death or absence of any of Our Council of the said Province, to fill up the vacancies in the said Council to the number of nine, and no more; you are from time to time to send unto Our Commissioners for Trade and Plantations, in order to be laid before Us, as aforesaid, the names and qualities of any member or members by you put into the said Council, by the first conveyance after your so doing. Nova Scotia.

6. And in the choice and nomination of the members of Our said Council, as also the Chief Officers, Judges, Assistants, Justices of the Peace and other Officers of Justice, you are always to take care that they be men of good life, well affected to Our Government, and of abilities suitable to their employments.

7. You are neither to augment nor diminish the number of Our said Council, as it is at present established, nor to suspend any of the members thereof without good and sufficient cause, nor without the consent of the majority of Our said Council, signalized in Council after due examination of the charge against such Councillor and his answer thereunto; and in case of the suspension of any of them, you are to cause your reasons for so doing, together with the charges and proofs against the said persons, and their answers thereto, to be duly entered upon the Council books, and forthwith to transmit copies thereof to Our Commissioners for Trade and Plantations, in order to be laid before Us; nevertheless if it should happen that you should have reasons for suspending any Councillor not fit to be communicated to the Council, you may in that case suspend such person without their consent. But you are thereupon immediately to send to Our Commissioners for Trade and Plantations, in order to be laid before Us, an account of your proceedings therein, with your reasons at large for such suspension, as also for not communicating the same to the Council, and duplicates thereof by the next opportunity.

8. And whereas we are sensible that effectual care ought to be taken to oblige the members of Our said Council to a due attendance therein, in order to prevent the many inconveniences that may happen for want of a quorum of the Council to transact business as occasion may require, it is Our will and pleasure, that, if any of Our said Council residing in Our said Province shall hereafter willingly absent themselves from the Province and continue absent for the space of six months together, without leave from

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you or from the Commander-in-Chief of the said Province for the time being first obtained under your or his hand and seal, or shall remain absent for the space of one year without our leave given them under Our Royal Signature, their places in the said Council shall immediately thereupon become void; and that if any of the members of the Council residing in our said Province shall wilfully absent themselves hereafter from the Council Board, when duly summoned, without a just and lawful cause, and shall persist therein after admonition, you suspend the said Councillors absenting themselves, till Our further pleasure be known, giving timely notice thereof to Our Commissioners for Trade and Plantations, in order to be laid before us; and We do hereby will and require you, that this Our Royal pleasure be signified to the several members of Our said Council, and that it be entered in the Council books of the said Province as a standing rule.

9. And to the end that Our Council may be assisting to you or to the Commander-in-Chief of Our said Province for the time being, in all affairs relative to Our service, you are to communicate to them such and so many of these Our instructions, wherein their advice and consent are mentioned to be requisite, and likewise all such others from time to time as you shall find convenient for Our service to be imparted to them.

10. You are also to permit the members of Our said Council, to have and enjoy freedom of debate and vote in all affairs of public concern, which may be debated in Council.

11. And it is Our will and pleasure, that the following regulations be carefully [observed] in the framing and passing all such laws, statutes and ordinances as are to be passed by you; with the advice and consent of Our said Council and Assembly, viz.:

That the style of enacting the said laws, statutes and ordinances be, by the Governor, Council and Assembly, and no other.

That each different matter be provided for by a different law, without including in one and the same Act, such things as have no proper relation to each other.

That no clause be inserted in any Act or Ordinance, which shall be foreign to what the title of it imports, and that no perpetual clause be part of any temporary law.

That no law or ordinance whatever be suspended, altered, continued, revived or repealed by general words;

but that the title and date of such law or ordinance be particularly mentioned in the enacting part.

That no law or ordinance respecting private property be passed, without a clause suspending its execution, until Our Royal will and pleasure is known, nor without a saving of the right of Us, Our heirs and successors, and of all bodies politic and corporate, and of all other persons, except such as are mentioned in the said law or ordinance, and those claiming by, from and under them; and before such law or ordinance is passed, proof must be made before you in Council, and entered in the Council books, that public notification was made of the party's intention to apply for such Act, in the several parish churches where the lands in question lie, for three Sundays at least successively, before any such law or ordinance shall be proposed; and you are to transmit and annex to the said law or ordinance, a certificate under your hand, that the same passed through all the forms above mentioned.

That in all laws or ordinances for levying money or imposing fines, forfeitures or penalties, express mention be made that the same is granted or reserved to Us, Our heirs and successors, for the public uses of the said Province, and the support of the Government thereof, as by the said law or ordinance shall be directed; and that a clause be inserted, declaring that the money arising by the operation of the said law or ordinance, shall be accounted for unto us, here in this Kingdom, and to Our Commissioners of Our Treasury or Our High Treasurer for the time being, and audited by Our Auditor-General of Our Plantations, or his Deputy.

That all such laws, statutes and ordinances be transmitted by you within three months after their passing, or sooner, if opportunity offers, to Our Commissioners for Trade and Plantations; that they be fairly abstracted in the margents and accompanied with very full and particular observations upon each of them, that is to say, whether the same is introductive of a new law, declaratory of a former law, or does repeal a law then before in being; and you are also to transmit in the fullest manner the reasons and occasion for enacting such laws or ordinances, together with fair copies of the Journals, of the Proceedings of the Council and Assembly, which you are to require from the Clerks of the said Council and Assembly.

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12. And whereas, great mischief may arise by passing Bills of an unusual and extraordinary nature and importance in Our plantations, which Bills remain in force there from the time of enacting until Our pleasure be signified to the contrary; We do hereby will and require you not to pass or give your assent to any Bill or Bills in the Assembly of Our said Province of an unusual or extraordinary nature and importance, wherein Our prerogative or the property of Our subjects may be prejudiced, or the trade and shipping of this Kingdom any ways affected, until you shall have first transmitted unto our Commissioners for Trade and Plantations, in order to be laid before Us, the draught of such a Bill or Bills, and shall have received Our Royal pleasure thereupon; unless you take care that there be a clause inserted therein suspending and deferring the execution thereof, until Our pleasure shall be known concerning the same.

13. And whereas, laws have formerly been enacted in several of Our plantations in America for so short a time, that the assent or refusal of Us or Our Royal predecessors could not be had thereupon before the time, for which such laws were enacted, did expire; you shall not, therefore, give your assent to any law that shall be enacted for a less time than two years, except in cases of imminent necessity, or immediate temporary expediency; and you shall not re-enact any law to which the assent of Us or Our Royal predecessors has once been refused, without express leave for that purpose first obtained from Us, upon a full representation by you to be made to Our Commissioners for Trade and Plantations, in order to be laid before Us, of the reasons and necessity for passing such law; nor give your assent to any law for repealing any other law passed in your Government, whether the same has or has not received Our Royal approbation, unless you take care that there be a clause inserted therein suspending and deferring the execution thereof, until Our pleasure shall be known concerning the same.

14. And it is Our express will and pleasure, that no law for raising any imposition on wines or other strong liquors be made to continue for less than one whole year; as also that all other laws made for the supply and support of the Government shall be without limitation of time, except the same be for a temporary service, and which shall expire and have their full effect within the time therein prefixed.

15. Whereas Acts have been passed in some of Our plantations in America, for striking bills of credit, and issuing out the same in lieu of money, in order to discharge their public debts, and for other purposes; from whence several inconveniences have arisen; it is therefore Our will and pleasure, that you do not give your assent to, or pass any Act in the Province of Nova Scotia under your Government, whereby bills of credit may be struck or issued in lieu of money, or for payment of money either to you, the Governor, or to any Lieutenant-Governor or Commander-in-Chief, or to any of the members of our Council or of the Assembly, or to any other person whatsoever, except to Us, Our heirs and successors, unless there be a clause inserted in such Act, declaring that the same shall not take effect until the said Act shall have been approved and confirmed by Us, Our heirs or successors. NOVA SCOTIA.

16. You are not to suffer any public money whatsoever to be issued or disposed of, otherwise than by warrant under your hand; the Assembly may, nevertheless, be permitted from time to time, to view and examine the accounts of money or value of money disposed of by virtue of laws made by them, which you are to signify unto them, as there shall be occasion.

17. And We do particularly require you to take care, that fair books of accounts of all receipts and payments of all public monies be duly kept, and the truth thereof attested upon oath, and that all such accounts be audited and attested by Our Auditor-General of our Plantations, or his Deputy, who is to transmit copies thereof to our Commissioners of our Treasury, or to our High Treasurer for the time being; and that you do every half year, or oftener, send another copy thereof attested by yourself, to our Commissioners for Trade and Plantations, and duplicates thereof, by the next conveyance, in which books shall be specified every particular sum raised or disposed of, together with the names of the persons, to whom any payment shall be made, to the end We may be satisfied of the right and due application of the revenue of Our said Province; with the probability of the increase or diminution of it under every head and article thereof.

18. Whereas several inconveniences have arisen to Our Governments in the plantations, by gifts and presents made to Our Governors by the General Assemblies, you are therefore to propose unto the Assembly, at their first meeting, and use your utmost endeavour with them,

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19. And whereas complaints have heretofore been made by the merchants of the city of London, in behalf of themselves and of several others Our good subjects of Great Britain trading to our plantations in America, that greater duties and impositions are laid on their ships and goods, than on the ships and goods of persons who are natives and inhabitants of the said plantations. It is therefore Our will and pleasure, that you do not, upon any pretence whatsoever, on pain of our highest displeasure, give your assent to any law, wherein the natives or inhabitants of the Province of Nova Scotia under your Government are put on a more advantageous footing than those of this Kingdom, or whereby duties shall be laid upon British shipping, or upon the products or manufactures of Great Britain upon any pretence whatsoever.

20. Whereas Acts have been passed in some of our plantations in America, for laying duties on the importation and exportation of Negroes to the great discouragement of the merchants trading thither from the Coast of Africa; and whereas Acts have likewise been passed for laying duties on felons imported, in direct opposition to

an Act of Parliament passed in the fourth year of the reign of His late Majesty King George the First, for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons. It is Our will and pleasure, that you do not give your assent to, or pass any Act imposing duties upon Negroes imported into our said Province under your Government, payable by the importer, or upon any slaves exported that have not been sold in Our said Province, and continued there for the space of twelve months. It is Our further will and pleasure, that you do not give your assent to, or pass any Act whatsoever for imposing duties on the importation of any felons from this Kingdom into the Province under your Government.

21. And whereas, an Act of Parliament was passed in the sixth year of the reign of Her late Majesty, Queen Anne, intituled: "An Act for ascertaining the rates of foreign coins in Her Majesty's Plantations in America," which Act all the respective Governors of all our Plantations in America have from time to time been instructed to observe and carry into due execution; and whereas, notwithstanding the same, complaints have been made, that the said Act has not been observed as it ought to have been in many of Our Colonies and Plantations in America; by means whereof many indirect practices have grown up, and various and illegal currencies have been introduced in several of Our said Colonies and Plantations, contrary to the true intent and meaning of the said Act, and to the prejudice of the trade of our subjects; it is, therefore, Our Royal will and pleasure, and you are hereby strictly required and commanded, under pain of Our highest displeasure, and of being removed from your Government, to take the most effectual care for the future, that the said Act be punctually and *bona fide* observed, and put in execution according to the true intent and meaning thereof.

22. You are to examine what rates and duties are charged, and payable on any goods exported and imported within Our said Province, whether of the growth or manufacture of the said Province, or otherwise; and you are to suppress the engrossing of commodities, as tending to the prejudice of that freedom which trade and commerce ought to have; and to use your best endeavours in the improving the trade of those parts, by settling such orders and regulations therein, with the advice of Our

Nova Scotia. said Council, as may be most acceptable to the generality of the inhabitants; and it is our express will and pleasure, that you do not, upon any pretence whatever, upon pain of Our highest displeasure, give your assent to any law or laws for setting up any manufactures, or carrying on any trade which are hurtful and prejudicial to this Kingdom, and that you do use your utmost endeavours to discourage, discountenance, and restrain any attempts which may be made to set up such manufactures, or establish any such trades.

23. Whereas it is necessary that Our rights and dues be preserved and recovered, and that speedy and effectual justice be administered in all cases relating to Our revenue, you are to take care that a Court of Exchequer be called and do meet at all such times as shall be needful; and you are to inform Our Commissioners for Trade and Plantations whether Our service may require that a constant Court of Exchequer be settled and established there.

24. You shall not erect any new Court or Office of Judicature, nor dissolve any Court or office already erected or established there.

25. Our will and pleasure is, that you or the Commander-in-Chief for the time being do in all civil causes, on application being made to you or the Commander-in-Chief for the time being for that purpose, permit and allow appeals from any of the Courts of Common Law in Our said Province unto you or the Commander-in-Chief and the Council of the said Province; and you are for that purpose to issue a writ, in the manner which has been usually accustomed, returnable before yourself and the Council of the said Province, who are to proceed to hear and determine such appeal, wherein such of the said Council as shall be at that time Judges of the Court from whence such appeal shall be so made to you our Captain-General or to the Commander-in-Chief for the time being, and to Our said Council, as aforesaid, shall not be admitted to vote on the said appeal, but they may, nevertheless, be present at the hearing thereof to give the reasons of the judgment given by them in the causes wherein such appeal shall be made; provided, nevertheless, that in all such appeals the sum or value appealed for do exceed the sum of three hundred pounds sterling, and that security be first duly given appellant to answer such charges as shall be awarded, in case the first sentence be affirmed; and if either party shall not rest satisfied with the judg-

ment of you or the Commander-in-Chief for the time being and Council, as aforesaid, Our will and pleasure is, that they may then appeal unto Us, in Our Privy Council; provided the sum or value so appealed for unto Us do exceed five hundred pounds sterling, and that such appeal be made within fourteen days after sentence, and good security given by the appellant, that he will effectually prosecute the same and answer the condemnation, as also pay such costs and damages as shall be awarded by Us, in case the sentence of you or the Commander-in-Chief for the time being and Council be affirmed; provided, nevertheless, where the matter in question relates to the taking or demanding any duty payable to Us, or to any fee of office, or annual rents, or other such like matter or thing, where the rights in future may be bound; in all such cases you are to admit an appeal to Us in Our Privy Council, though the immediate sum or value appealed for be of less value; and it is Our further will and pleasure that in all cases where, by your instructions, you are to admit appeals unto Us in Our Privy Council, execution be suspended until the final determination of such appeal, unless good and sufficient security be given by the appellee to make ample restitution of all that the appellant shall have lost by means of such decree or judgment, in case upon the determination of such appeal, such decree or judgment should be reversed, and restitution awarded to the appellant. Nova Scotia.

26. You are also to permit appeals unto Us in Our Privy Council in all cases of fines imposed for misdemeanours, provided the fines so imposed amount to, or exceed, the sum of one hundred pounds sterling, the appellant first giving good security that he will effectually prosecute the same, and answer the condemnation if the sentence by which such fine was imposed in Nova Scotia shall be confirmed.

27. You shall not remit any fines or forfeitures whatsoever above the sum of ten pounds, nor dispose of any forfeitures whatsoever until upon signifying unto the Commissioners of Our Treasury or Our High Treasurer for the time being, and to Our Commissioners for Trade and Plantations, the nature of the offence, and the occasion of such fines and forfeitures, with the particular sums or value thereof (which you are to do with all speed) you shall have received Our directions thereon, but you may, in the meantime suspend the payment of the said fines and forfeitures.

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28. It is Our will and pleasure that you do not dispose of any forfeitures or escheats to any person until the proper officer has made enquiry by a jury upon their oaths into the true nature thereof, nor until you shall have transmitted to Our Commissioners of Our Treasury and unto Our Commissioners for Trade and Plantations, a particular account of such forfeitures and escheats, and the nature thereof, and shall have received our directions thereupon; and you are to take care that the produce of such forfeitures and escheats, in case we shall think proper to give you directions to dispose of the same, be duly paid to Our Receiver-General of the said Province, and a full account thereof transmitted to the Commissioners of Our Treasury or Our High Treasurer for the time being, and to Our Commissioners for Trade and Plantations, with the names of the persons to whom disposed. And provided that in the grants of all forfeited and escheated lands there be a clause obliging the grantee, in case the same was not cultivated and planted before to the same terms and conditions of cultivation and improvements as are hereinafter directed, with respect to all other grants of lands by you to be made within Our said Province, and that there be proper savings and reservations of quit rents to Us, Our heirs and successors.

29. And you are, with the advice and consent of Our Council, to take especial care to regulate all salaries and fees belonging to places, or paid upon emergencies, that they be within the bounds of moderation, and that no exaction be made on any occasion whatsoever; as also that tables of all fees be publicly hung up in all places where such fees are to be paid; and you are to transmit copies of all such tables of fees to our Commissioners for Trade and Plantations, as aforesaid, in order to be laid before us.

30. And you are to transmit to our Commissioners for Trade and Plantations, with all convenient speed, a particular account of all establishments of jurisdiction, courts, offices and officers, powers, authorities, fees and privileges granted and settled within Our said Province; as likewise an account of all the expenses attending the establishment of the said courts, and of such funds as are settled and appropriated for discharging such expenses.

31. You shall not appoint any person to be a Judge or Justice of the Peace, without the advice and consent of at least three of our Council; nor shall you execute yourself,

or by deputy, any of the said offices. And it is Our further will and pleasure, that all Commissions to be granted by you to any person or persons, to be Judge, Justice of the Peace, or other necessary officers, be granted during pleasure only.

32. You shall not displace any of the Judges, Justices, Sheriffs or other officers or Ministers within our said Province, already appointed, without good and sufficient cause, to be signified in the most full and distinct manner to Our Commissioners for Trade and Plantations, in order to be laid before Us by the first opportunity after such removal.

33. And whereas, frequent complaints have been made of great delays and undue proceedings in the Courts of Justice in several of Our Plantations, whereby many of Our good subjects have very much suffered; and it being of the greatest importance to Our service and to the welfare of Our Plantations that Justice be everywhere speedily and duly administered, and that all disorders, delays, and other undue practices in the administration thereof be effectually prevented; We do particularly require you to take especial care, that, in all Courts where you are authorized to preside, justice be impartially administered; and that in all other Courts established within Our said Province all Judges and other persons therein concerned do likewise perform their several duties without delay or partiality.

34. You are to take care that no Court of Judicature be adjourned but upon good grounds; as also, that no orders of any Court of Judicature be or allowed, which shall not be first read and approved of by the Magistrates in open Court, which rule you are in like manner to see observed with relation to the proceedings of Our Council in Nova Scotia; and that all orders there made be first read and approved in Council before they are entered upon the Council books.

35. You are to take care that all writs within Our said Province be issued in Our name.

36. You shall take care, with the advice and assistance of Our Council, that proper prisons be forthwith erected, and put into and kept in such a condition as may sufficiently secure the prisoners that are or shall be there in custody.

37. You shall not suffer any person to execute more offices than one by deputy.

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38. Whereas there are several offices in Our Plantations granted under the Great Seal of Great Britain, and Our service may be very much prejudiced by reason of the absence of the Patentees, and by their appointing deputies not fit to officiate in their stead, you are therefore to inspect such of the said offices as are in Our said Province, under your government, and enquire into the capacity and behaviour of the persons exercising them, and to report thereupon to Our Commissioners for Trade and Plantations, what you think fit to be done or altered in relation thereunto. And you are, upon the misbehaviour of any of the said Patentees or their deputies, to suspend them from the execution of their places, till you shall have represented the whole matter unto Our Commissioners for Trade and Plantations, in order to be laid before Us, and shall have received Our directions thereon; and in case of the death of any such deputy, it is Our express will and pleasure that you take care that the person appointed to execute the place, until the Patentee can be informed thereof, and appoint another deputy, do give sufficient security to the Patentee, or in case of suspension, to the person suspended, to be answerable for the profits accruing during such interval by death or during such suspension, in case We shall think fit to restore the person suspended to his place again. It is, nevertheless, Our will and pleasure that the person executing the place, during such intervals by death or suspension, shall, for his encouragement, receive the same profits as the person dead or suspended did receive; and it is Our further will and pleasure that, in case of the suspension of a Patentee, the person appointed by you to execute the office during such suspension shall, for his encouragement, receive a moiety of the profits, which would otherwise have accrued and become due to such Patentee, giving security to such Patentee to be answerable to him for the other moiety, in case We shall think fit to restore him to his place again.

39. You shall not, by colour of any power or authority hereby or otherwise granted or mentioned to be granted unto you, take upon you to give, grant or dispose of any place or office within Our said Province, which now is or shall be granted under the Great Seal of this Kingdom or to which any person is or shall be appointed by warrant under Our Signet or Sign Manual, any further than that you may, upon the vacancy of any such office or place, or upon the suspension of any such

officer by you, as aforesaid, put in any fit person to officiate in the interval, till you shall have represented the matter unto Our Commissioners for Trade and Plantations, in order to be laid before Us, as aforesaid (which you are to do by the first opportunity), and till the said office or place be disposed of by Us, Our heirs or successors under the Great Seal of this Kingdom, or until some person shall be appointed thereto under Our Signet and Sign Manual, or Our further directions be given therein; and it is Our express will and pleasure, that you do countenance and give all due encouragement to all Our Patent Officers in the enjoyment of their legal and accustomed fees, rights, privileges and emoluments, according to the true intent and meaning of their Patents. Nova Scotia.

40. And whereas several complaints have been made by the Surveyors-General and other Officers of Our Customs in Our Plantations in America, that they have been frequently obliged to serve on juries, and personally to appear in arms, whenever the Militia is drawn out, and thereby are much hindered in the execution of their employments; Our will and pleasure is that you take effectual care, and give the necessary directions, that the several Officers of Our Customs be excused and exempted from serving on any juries, or personally appearing in arms in the Militia, unless in cases of absolute necessity, or serving any parochial offices, which may hinder them in the execution of their duties.

41. And whereas the Surveyors-General of Our Customs in the Plantations are empowered in case of the vacancy of any of Our offices of the Customs, by death, removal or otherwise, to appoint other persons to execute such offices, until they receive further directions from Our Commissioners of Our Treasury or Our High Treasurer, or the Commissioners of Our Customs for the time being; but in regard the districts of the said Surveyors-General are very extensive, and that they are required at proper times to visit the officers in the several Governments under their inspection, and that it may happen that some of the officers of Our Customs, who may hereafter be established in our Province of Nova Scotia, may die at the time when the Surveyor-General is absent in some distant part of his district, so that he cannot receive advice of such officer's death within a reasonable time, and thereby make provision for carrying on the service, by appointing some other person in the room of such officer who may happen

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to die; therefore that there may be no delay given on such occasions to the masters of ships or merchants in their despatches, it is Our further will and pleasure, in case of such absence of the Surveyor-General, or if he should happen to die, and in such case only, that upon the death of any Collector of Our Customs within that Our Province, you shall make choice of a person of known loyalty, experience, diligence and fidelity, to be employed in such Collector's room for the purposes aforesaid, until the Surveyors-General of Our Customs shall be advised thereof and appoint another to succeed in his place, or until further directions shall be given therein by Our Commissioners of Our Treasury, or Our High Treasurer, or by the Commissioners of Our Customs for the time being, which shall be first signified; taking care that you do not, under pretence of this instruction, interfere with the powers and authorities given by the Commissioners of Our Customs to the said Surveyor-General, when he is able to put the same in execution.

R.R.R.

Victoria R.

Additional Instruction to Our Right Trusty and Right Well-beloved Cousin and Councillor, John George, Earl of Durham, Knight Grand Cross of the Most Honourable Order of the Bath, Our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia, or, in his absence, to Our Lieutenant-Governor, or the Officer Administering the Government of Our said Province for the time being. Given at Our Court at Buckingham Palace, the ninth day of March, 1838, in the first year of Our reign.

Whereas, We did by Our Commission, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the 6th day of February, 1838, in the first year of Our reign, appointing you Our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia, grant, provide and declare that there should thenceforth be established, within Our said Province, an Executive Council, to consist of such and so many members as should, from time to time, be nominated and appointed by Us under Our Royal Sign

Manual and Signet, or as should be provisionally appointed by you, until Our further pleasure therein should be known. Nova Scotia.

Now, Know You, that We, reposing especial trust and confidence in the wisdom, prudence and ability of our trusty and well-beloved Thomas N. Jeffrey, Enos Collins, Simon B. Robie, Samuel Cunard, Henry H. Cogswell, Joseph Allison, Esquires; Sir Rupert George, Baronet; James W. Johnson, James B. Uniacke, Edmund M. Dodd, Hubert Huntington, Thomas N. J. Dewolf, and Michael Tobin, Esquires, do by these Our instructions constitute and appoint them, the said Thomas N. Jeffery, Enos Collins, Simon B. Robie, Samuel Cunard, Henry H. Cogswell, Joseph Allison, Sir Rupert George, James W. Johnson, James B. Uniacke, Edmund M. Dodd, Hubert Huntington, Thomas N. J. Dewolf, and Michael Tobin, to be, during Our pleasure, Executive Councillors in Our said Province of Nova Scotia, and you are hereby authorized and required to summon them to Our said Executive Council accordingly.

And We do further direct and appoint that the members of Our said Executive Council shall take rank and precedence in the said Council according to the order in which their names are hereinbefore inserted, and that in all other cases the members of Our said Council shall take rank and precedence therein according to the date and seniority of their respective appointments.

GOVERNMENT HOUSE,
FREDERICTON, 16th October, 1882.

SIR,—I regret the delay that has occurred in replying to your despatch of the 24th of August last, referred to in your despatch of the 6th inst., requesting copies of the Charter or Constitutions granted by the Crown to the Province of New Brunswick, if these documents are to be found among the records of the Province, the same having been asked for by an Address of the House of Commons. After diligent search the only document that has been discovered among the records of the Province, is the Commission issued to Thomas Carleton, Esq., in the twenty-fourth year of the reign of His late Majesty,

New Brunswick.

George the Third, appointing him Governor of the Province of New Brunswick, with powers to appoint a Council, create Courts and call an Assembly, &c., &c., &c., a copy of which I forward herewith. If any other documents, bearing on the subject are discovered, I will forward copies of the same.

I have the honour to be, Sir,
Your obedient servant,

R. D. Wilmot,
Lieutenant-Governor.

Hon. Secretary of State.

George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, etc.

To Our Trusty and Well-beloved Thomas Carleton, Esq.,

Greeting:—

We, reposing especial trust and confidence in the prudence, courage and loyalty of you, the said Thomas Carleton, of Our special grace, certain knowledge and mere motion, have thought fit to constitute and appoint you, the said Thomas Carleton, to be Our Captain-General and Governor-in-Chief of Our Province of New Brunswick, bounded on the westward by the mouth of the River Saint Croix, by the said river to its source, and by a line drawn due north from thence to the southern boundary of Our Province of Quebec, to the northward by the said boundary as far as the western extremity of the Bay des Chaleur, to the eastward by the said Bay and the Gulf of St. Lawrence to the Bay called Bay Verte, to the south by a line in the centre of the Bay of Fundy from the River Saint Croix, aforesaid, to the mouth of the Musquat River, by the said river to its source and from thence by a due east line across the isthmus into the Bay Verte to join the eastern line above described, including all islands within six leagues of the coast, with all the rights, members and appurtenances whatsoever thereunto belonging, and We do hereby require and command you to do and execute all things in due manner that shall belong to your said command, and the trust We have reposed in you according to the several powers

and authorities granted or appointed you by this present Commission, and instructions herewith given you, or by such further powers, instructions and authorities as shall at any time hereafter be granted or appointed you under Our Signet and Sign Manual or by Our order in Our Privy Council, and according to such reasonable Laws and Statutes as shall hereafter be made or agreed upon by you, with the advice and consent of Our Council and the Assembly of Our said Province under your Government, when such Assembly shall be called, in such manner and form as is hereafter expressed; and Our will and pleasure is that you, the said Thomas Carleton, after the publication of these Our Letters Patent, do take the Oaths appointed to be taken by an Act passed in the first year of the reign of King George the First, intituled: "An Act for the further security of His Majesty's Person and Government, and the succession of the Crown in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors," as altered and explained by an Act passed in the sixth year of Our reign, intituled: "An Act for altering the oath of abjuration and the assurance, and for amending so much of an Act of the seventh year of Her late Majesty Queen Anne, intituled: 'An Act for the improvement of the Union of the two Kingdoms,' as, after the time therein limited, requires the delivery of certain lists and copies, therein mentioned, to persons indicted of high treason or misprision of treason," as also that you make and subscribe the declaration mentioned in an Act of Parliament made in the twenty-fifth year of the reign of King Charles the Second, intituled: "An Act for preventing dangers which may happen from Popish Recusants," and likewise that you take the usual Oath for the due execution of the office and trust of Our Captain-General and Governor-in-Chief of Our said Province for the due and impartial administration of Justice; and further, that you take the oath required to be taken by Governors of Plantations, to do their utmost that the several Laws relating to Trade and the Plantations be observed, all which said Oaths and Declarations Our Council in Our said Province, or any five of the members thereof have hereby full power and authority and are required to tender and administer unto you, and in your absence to Our Lieutenant-Governor if there be any upon the

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place: All which being duly performed, you shall administer unto each of the members of Our said Council, as also to Our Lieutenant-Governor, if there be any upon the place, the said Oaths mentioned in the first recited Act of Parliament altered as above, as also cause them to make and subscribe the above-mentioned declaration, and to administer to them the Oath for the due execution of their places and trusts. And We do hereby give and grant unto you full power and authority to suspend any of the members of Our said Council from sitting, voting and assisting therein, if you shall find just cause for so doing; and if it shall at any time happen that by the death, departure out of Our said Province, suspension of any of Our said Councillors, or otherwise, there shall be a vacancy in Our said Council (any five whereof We do hereby appoint to be a Quorum) Our will and pleasure is that you signify the same unto Us by the first opportunity, that we may, under Our Signet and Sign Manual, constitute and appoint others in their stead. But that Our affairs at that distance may not suffer for want of a due number of Councillors, if ever it shall happen that there be less than nine of them residing in Our said Province, We do hereby give and grant unto you, the said Thomas Carleton, full power and authority to choose as many persons out of the principal freeholders inhabitants thereof as shall make up the full number of our said Council to be nine and no more, which persons so chosen and appointed by you shall be, to all intents and purposes, Councillors in our said Province, until either they shall be confirmed by us, or that by the nomination of others by us under our Sign Manual and Signet Our said Council shall have nine or more persons in it.

And We do hereby give and grant unto you, the said Thomas Carleton, full power and authority, with the advice and consent of Our said Council to be appointed as aforesaid, so soon as the situation and circumstances of Our Province under your Government will admit thereof, and when, and as often as need shall require, to summon and call General Assemblies of the Freeholders and Settlers in the Province under your Government, in such manner and according to such further powers, instructions, and authorities, as shall at any time hereafter be granted or appointed you under Our Signet and Sign Manual, or by Our order in Our Privy Council. And Our will and pleasure is that the persons thereupon

duly elected by the major part of the Freeholders of the respective Counties and places, and so returned, shall, before their sitting, take the Oaths mentioned in the first recited Act of Parliament altered as above, and also make and subscribe the afore-mentioned declaration; which Oaths and declarations you shall commissionate fit persons, under Our Seal of New Brunswick to tender and administer unto them; and until the same shall be so taken and subscribed, no person shall be capable of sitting, though elected. And We do hereby declare, that the persons so elected and qualified shall be called and deemed The General Assembly of that Our Province of New Brunswick. And that you, the said Thomas Carleton, with the advice and consent of Our said Council and Assembly, or the major part of them respectively, shall have full power and authority to make, constitute and ordain, laws, statutes and ordinances for the public peace, welfare and good government of Our said Province and of the people and inhabitants thereof, and such others as shall resort thereto, and for the benefit of Us, Our Heirs and Successors, which said Laws, Statutes and Ordinances are not to be repugnant, but as near as may be to the Laws and Statutes of this Our Kingdom of Great Britain. Provided that all such Laws, Statutes and Ordinances, of what nature or duration soever, be, within three months or sooner after the making thereof, transmitted to Us under Our Seal of New Brunswick, for Our approbation or disallowance of the same, as also duplicates thereof by the next conveyance. And, in case any or all of the said Laws, Statutes, and Ordinances not before confirmed by Us, shall at any time be disallowed and not approved, and so signified by Us, Our Heirs or Successors, under Our or their Sign Manual and Signet, or by order of Our or their Privy Council, unto you, the said Thomas Carleton, or to the Commander-in-Chief of the said Province for the time being, then such and so many of the said Laws, Statutes and Ordinances as shall be so disallowed and not approved, shall from thenceforth cease, determine and become utterly void and of none effect, anything to the contrary thereof notwithstanding. And to the end that nothing may be passed or done by Our said Council or Assembly to the prejudice of Us, Our Heirs and Successors, We will and ordain that you, the said Thomas Carleton, shall have and enjoy a prerogative voice in making and passing of all Laws, Statutes and Ordinances

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as aforesaid, and you shall and may likewise, from time to time, as you shall judge it necessary, adjourn, prorogue, and dissolve all General Assemblies as aforesaid.

And We do hereby authorize and empower you to keep and use the public seal which will be herewith delivered to you, or shall be hereafter sent to you, for sealing all things whatsoever that shall pass the Great Seal of Our said Province.

And We do, by these Presents, give and grant unto you, the said Thomas Carleton, full power and authority, with the advice and consent of Our said Council, to erect, constitute and establish such and so many Courts of Judicature and Public Justice within Our said Province as you and they shall think fit and necessary for the hearing and determining of all causes, as well Criminal as Civil, according to Law and Equity, and for awarding execution thereupon with all reasonable and necessary powers, authorities, fees and privileges belonging thereunto, as also to appoint and commissionate fit persons in the several parts of your Government to administer the Oaths mentioned in the first recited Act of Parliament altered as above, as also to tender and administer the aforesaid declaration unto such persons belonging to the said Courts, as shall be obliged to take the same. And We do hereby authorize and empower you to constitute and appoint Judges, and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary Officers and Ministers in Our said Province, for the better administration of Justice, and putting the Laws in execution, and to administer or cause to be administered unto them, such Oath or Oaths as are usually given for the due execution and performance of offices and places, and for the clearing of truth in judicial causes. And We do hereby give and grant unto you full power and authority, where you shall see cause, or shall judge any offender or offenders in criminal matters or for any fines or forfeitures due unto Us, fit objects of Our mercy, to pardon all such offenders, and to remit all such offences, fines and forfeitures, treason and wilful murder only excepted, in which cases you shall likewise have power, upon extraordinary occasions, to grant reprieves to the offenders until and to the intent Our Royal pleasure may be known therein.

And whereas it belongeth to Us in right of Our Royal Prerogative to have the custody of Idiots and their

Estates, and to take the profits thereof to our own use, finding them necessaries; and also to provide for the custody of Lunatics and their estates, without taking the profits thereof to our own use; and whereas, while such Idiots and Lunatics, and their estates, remain under our immediate care, great trouble and charges may arise to such as shall have occasion to resort unto Us for direction respecting such Idiots and Lunatics, and their estates, and considering that writs of inquiry of Idiots and Lunatics are to issue out of Our several Courts of Chancery, as well in Our Provinces in America as within this Our Kingdom, respectively, and the inquisitions thereupon taken are returnable in those Courts: We have thought fit to intrust you with the care and commitment of the custody of the said Idiots and Lunatics, and their estates, and We do by these presents give and grant unto you full power and authority, without expecting any further special warrant from Us, from time to time, to give order and warrant for the preparing of grants of the custodies of such Idiots and Lunatics, and their estates, as are or shall be found, by inquisition thereof, taken or to be taken, and returnable into Our Court of Chancery, and thereupon to make and pass grants and commitments, under Our Great Seal of Our Province of New Brunswick, of the custodies of all and every such Idiots and Lunatics, and their estates, to such person or persons suitors in that behalf as, according to the rules of law and the use and practice in these and the like cases, you shall judge meet for that trust, the said grants and commitments to be made in such manner and form, or as nearly as may be, as hath been heretofore used and accustomed in making the same under the Great Seal of Great Britain, and to contain such apt and convenient covenants, provisions and agreements on the part of the committees and grantees to be performed, and such security to be by them given, as shall be required and needful.

We do by these Presents authorize and empower you to collate any person or persons to any Churches, Chapels, or other Ecclesiastical Benefices within Our said Province, as often as any of them shall happen to be void.

And We do hereby give and grant unto you, the said Thomas Carleton, by yourself or by your Captains and Commanders by you to be authorized, full power and authority to levy, arm, muster, command and employ all

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persons whatsoever, residing within Our said Province, and, as occasion shall serve, to march from one place to another, or to embark them for the resisting and withstanding of all enemies, pirates, and rebels, both at land and sea, and to transport such forces to any of Our Plantations in America, if necessity shall require, for the defence of the same against the invasion or attempts of any of Our enemies, and such enemies, pirates and rebels (if there shall be occasion) to pursue and prosecute in or out of the limits of Our said Province and Plantations, or any of them, and (if it shall so please God) to vanquish, apprehend and take them, and being taken, according to law, put to death, or keep and preserve them alive, at your discretion; and to execute Martial Law in time of invasion or other times when by law it may be executed, and to do and execute all and every other thing or things which to Our Captain-General and Governor-in-Chief doth or ought of right to belong. And We do hereby give and grant unto you full power and authority, by and with the advice and consent of Our said Council of New Brunswick, to erect, raise and build in Our said Province such and so many Forts and Platforms, Castles, Cities, Boroughs, Towns and Fortifications as you by the advice aforesaid shall judge necessary, and the same or any of them to fortify and furnish with ordnance, ammunition and all sorts of Arms fit and necessary for the security and defence of Our said Province, and by the advice aforesaid the same again or any of them to demolish or dismantle, as may be most convenient.

And forasmuch as divers mutinies and disorders may happen by persons shipped and employed at sea during the time of war, and to the end that such as shall be shipped and employed at sea during the time of war may be better governed and ordered, We do hereby give and grant unto you, the said Thomas Carleton, full power and authority to constitute and appoint Captains, Lieutenants, Masters of Ships and other Commanders and Officers, and to grant unto such Captains, Lieutenants, Masters of Ships and other Commanders and Officers, commissions to execute the Law Martial during the time of war, according to the directions of an Act passed in the twenty-second year of the Reign of Our late Royal Grandfather, intituled, "An Act for amending, explaining and reducing into one Act of Parliament the Laws relating to the Government of His Majesty's Ships, Vessels

and forces by Sea," as the same is altered by an Act passed in the nineteenth year of Our reign, intituled, "An Act to explain and amend an Act made in the twenty-second year of the reign of His late Majesty King George the Second, intituled, 'An Act for amending, explaining and reducing into one Act of Parliament the laws relating to the government of His Majesty's Ships, Vessels, and Forces by Sea,'" and to use such proceedings, authorities, punishments and executions upon any offender or offenders as shall be mutinous, seditious, disorderly, or any way unruly, either at sea or during the time of their abode or residence in any of the Ports, Harbours, or Bays of Our said Province, as the case shall be found to require, according to the Martial Law and the said directions during the time of war as aforesaid. Provided that nothing herein contained shall be construed to the enabling you, or any by your authority, to hold plea, or have any jurisdiction of any offence, cause, matter, or thing committed or done upon the high sea, or within any of the havens, rivers, or creeks of Our said Province under your government, by any Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or person whatsoever, who shall be in Our actual service and pay in or on board of any of Our Ships of War, or other Vessels acting by immediate Commission or Warrant from Our Commissioners for executing the office of Our High Admiral, or from Our High Admiral of Great Britain for the time being, under the Seal of Our Admiralty; but that such Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or other person so offending, shall be left to be proceeded against and tried as their offences shall require, either by Commission under Our Great Seal of Great Britain, as the Statute of the twenty-eighth year of Henry the Eighth directs, or by Commission from Our said Commissioners for executing the Office of Our High Admiral, or from Our High Admiral of Great Britain for the time being, according to the aforementioned Act, intituled, "An Act for amending, explaining, and reducing into one Act of Parliament the Laws relating to the Government of His Majesty's Ships, Vessels, and Forces at Sea," as the same is altered by an Act passed in the nineteenth year of Our reign, intituled, "An Act to explain and amend an Act made in the twenty-second year of the reign of His late Majesty King George the Second, intituled 'An Act for amending, explaining and reducing

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into one Act of Parliament the laws relating to the government of His Majesty's Ships, Vessels, and Forces by Sea.'" Provided, nevertheless, that all disorders and misdemeanours committed on shore by any Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or other person whatsoever, belonging to any of Our Ships of War, or other Vessel acting by immediate Commission or Warrant from Our said Commissioners for executing the Office of Our High Admiral, or from Our High Admiral of Great Britain for the time being, under the Seal of Our Admiralty, may be tried and punished according to the Laws of the place where any such disorders, offences, and misdemeanours, shall be committed on shore, notwithstanding such offender be in Our actual service, and borne in Our pay on board any such Our Ships of War, or other Vessels acting by immediate Commission or Warrant from our said Commissioners for executing the Office of High Admiral, or Our High Admiral of Great Britain for the time being, as aforesaid, so as he shall not receive any protection for the avoiding of Justice for such offences committed on shore from any pretence of his being employed in Our service at sea.

And Our further will and pleasure is that all public money raised, or which shall be raised by any Act hereafter to be made within Our said Province, be issued out by warrant from you, by and with the advice and consent of Our said Council, and disposed of by you for the support of the Government, or for such other purposes as shall be particularly directed in and by such Act, and not otherwise. And We do likewise give and grant unto you full power and authority, by and with the advice and consent of Our said Council, to settle and agree with the inhabitants of Our said Province for such lands, tenements and hereditaments as now are, or hereafter shall be, in Our power to dispose of and them to grant to any person or persons, upon such terms and under such Quit Rents, services and acknowledgments as We, by Our Instructions given you herewith, or which We may hereafter give you, shall think fit to appoint, order and direct, which said Grants are to pass and be sealed with Our Seal of New Brunswick, and being entered upon Record by such Officer or Officers as shall be appointed thereunto, shall be good and effectual in Law against Us, Our Heirs and Successors.

And We do hereby give you, the said Thomas Carleton, full power to order and appoint Fairs, Marts and Markets, as also such and so many Ports, Harbours, Bays, Havens and other places for the convenience and security of Shipping, and for the better loading and unloading of goods and merchandize, as by you, with the advice and consent of the said Council, shall be thought fit and necessary.

And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other Inhabitants of Our said Province, to be obedient, aiding and assisting unto you, the said Thomas Carleton, in the execution of this Our Commission, and of the powers and authorities herein contained; and in case of your death or absence out of Our said Province, to be obedient, aiding and assisting unto such persons as shall be appointed by Us to be Our Lieutenant-Governor or Commander in Chief of Our said Province; to whom We do, therefore, by these Presents, give and grant all and singular the powers and authorities herein granted, to be by him executed and enjoyed during Our pleasure or until your arrival within Our said Province. And if, upon your death or absence out of Our said Province, there be no person upon the place commissionated and appointed by Us to be Our Lieutenant-Governor or Commander in Chief of the said Province, Our will and pleasure is that the eldest Councillor who shall be, at the time of your death or absence, residing within Our said Province, shall take upon him the Administration of the Government, and execute our said Commission and Instructions and the several powers and authorities therein contained, in the same manner, to all intents and purposes, as other Our Governor or Commander in Chief should or ought to do, in case of your absence, until your return, or in all cases until Our further pleasure be known therein; And We do hereby declare, ordain and appoint, that you, the said Thomas Carleton, shall and may hold, execute and enjoy the Office and place of Our Captain General and Governor in Chief in and over Our said Province of New Brunswick, with all its rights, members and appurtenances whatsoever, together with all and singular the powers and authorities hereby granted unto you, for and during Our will and pleasure.

In Witness whereof, We have caused these Our Letters

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to be made Patent: Witness Ourself, at Westminster, the sixteenth day of August, in the twenty-fourth year of Our Reign.

By Writ of Privy Seal,

YORKE.

I, J. Woodforde Smith, do hereby certify that I have carefully compared the foregoing with the Commission on file in the Provincial Secretary's Office, Province of New Brunswick, and find the same to be a correct copy.

Dated at Fredericton,
this fourteenth day of October, A.D. 1882.

J. WOODFORDE SMITH,
Deputy Provincial Secretary.

APPENDIX III.

Constitution of the United States of America.

We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1. All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.—(1) The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

(2) No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

(3) Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall

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have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three. [See B. N. A. Act, sect. 51.]

(4) When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

(5) The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

Section 3.—(1) The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six years; and each senator shall have one vote.

(2) Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

(3) No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen. [See B. N. A. Act, sect. 23.]

(4) The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

(5) The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

(6) The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of

the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

(7) Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust or profit under the United States: but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4.—(1) The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

(2) The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5.—(1) Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide. [See B. N. A. Act, sects. 35 and 47.]

(2) Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds expel a member.

(3) Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

(4) Neither house during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section 6.—(1) The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their atten-

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dance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

(2) No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

Section 7.—(1) All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills. [See B. N. A. Act, sect. 53.]

(2) Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it with his objections to that house in which it shall have originated; who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law. [See B. N. A. Act, Sects. 55-57].

(3) Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him; or being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

The Congress shall have power—

Section 8.—(1) To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States. [See B. N. A. Act, sect. 91, sub-sects. 3 and 7.]

(2) To borrow money on the credit of the United States. [See B. N. A. Act, sect. 91, sub-sect. 4.]

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes. [See B. N. A. Act, sect. 91, sub-sects. 2 and 24.]

(4) To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States. [See B. N. A. Act, sect. 91, sub-sect. 21.]

(5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. [See B. N. A. Act, sect. 91, sub-sects. 14 and 17.]

(6) To provide for the punishment of counterfeiting the securities and current coin of the United States. [See B. N. A Act, sect. 91, sub-sect. 14.]

(7) To establish post-offices and post-roads. [See B. N. A. Act, sect. 91, sub-sect. 5.]

(8) To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. [See B. N. A. Act, sect. 91, sub-sects. 22 and 23.]

(9) To constitute tribunals inferior to the Supreme Court. [See B. N. A. Act, sect. 101.]

(10) To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

(11) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

(12) To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years. [See B. N. A. Act, sect. 91, sub-sect. 7.]

(13) To provide and maintain a navy. [See B. N. A. Act, sect. 91, sub-sect. 7.]

(14) To make rules for the government and regulation of the land and naval forces. [See B. N. A. Act, sect. 91, sub-sect. 7.]

ARTICLE I.

(15) To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions. [See B. N. A. Act, sect. 91, sub sect. 7.]

(16) To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. [See B. N. A. Act, sect. 91, sub-sect. 7.]

(17) To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:—and

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof.

Section 9.—(1) The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

(2) The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

(3) No bill of attainder, or *ex post facto* law, shall be passed.

(4) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

(5) No tax or duty shall be laid on articles exported from any State.

(6) No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

(7) No money shall be drawn from the Treasury but

in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

(8) No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State.

Section 10.—(1) No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

(2) No State shall without the consent of the Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress.

(3) No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

Section 1.—(1) The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years; and, together with the Vice-President chosen for the same term, be elected as follows: [See B. N. A. Act, sect. 9.]

(2) Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

ARTICLE II.

(3) The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President, and if no person have a majority, then from the five highest on the list, the said house shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President; but if there should remain two or more who have equal votes the Senate shall choose from them by ballot the Vice-President.

(4) The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

(5) No person, except a natural-born citizen or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

(6) In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may, by law, provide for the case of removal, death, resignation, or inability both of the President and Vice-President,

declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or a President shall be elected. ARTICLE II.

(7) The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

(8) Before he enter on the execution of his office, he shall take the following oath or affirmation:

(9) "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States; and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2.—(1) The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. [See B. N. A. Act, sect. 15.]

(2) He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers and Consuls, Judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

(3) The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3.—(1) He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extra-

ARTICLE II. ordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive Ambassadors and other public ministers. He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. [See B. N. A. Act, sect. 99.]

Section 2.—(1) The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects.

(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

(3) The trial of all crimes, except in cases of impeach-

ment, shall be by jury, and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed. ARTICLE III.

Section 3.—(1) Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(2) The Congress shall have power to declare the punishment of treason, bnt no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

Section 1.—(1) Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.

Section 2.—(1)The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

(2) A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

(3) No person held to service or labour in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labour; but shall be delivered up on claim of the party to whom such service or labour may be due.

Section 3.—(1) New States may be admitted by the Congress into this union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislature of the States concerned, as well as of the Congress.

ARTICLE IV.

(2) The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution; or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate. [See B. N. A. Act, sect. 92, sub-sect 1.]

ARTICLE VI.

Section 1. All debts contracted and engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution, as under the confederation.

Section 2. This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Section 3. The Senators and representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine States shall be sufficient for the establishment of this constitution between the States so ratifying the same.

AMENDMENTS.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENTS.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers, not delegated to the United States by the Constitution, nor prohibited by it to the States, are referred to the States respectively, or to the people. [See B. N. A. Act, sects. 91 and 92.]

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII.

1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves. They shall name in the ballots the person voted for as President, and in distinct ballots, the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed, and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them,

AMENDMENTS. before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President. A quorum for the purpose shall consist of two-thirds of the whole number of Senators, a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this Article by appropriate legislation.

ARTICLE XIV.

1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But, when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one

years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens, twenty-one years of age, in such State.

3. No person shall be a Senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

4. The validity of the Public Debt of the United States, authorized by law, including debts incurred for the payment of pensions and bounties for services in suppressing insurrection and rebellion shall not be questioned.

But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, or claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

Article XV.

1. The right of citizens of the United States to vote shall not be denied to or abridged by the United States, or any State, on account of race, colour, or previous condition of servitude.

2. The Congress shall have power to enforce this Article by appropriate legislation.

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ATTORNEY-GENERAL.—The Attorney-General of the Province is the officer of the Crown who is considered as present in the Courts of the Province to assert the rights of the Crown, and of those who are under its protection. The Attorney-General of the Province, and not the Attorney-General of the Dominion, is the proper party to file an information where the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of the Province, even though such rights are created by an Act of the Parliament of the Dominion. The Attorney-General of the Province is the proper person to file an information in respect of a nuisance caused by interference with a railway. Though the power of making criminal laws is vested in the Dominion Parliament, the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of Justice in the Province.—*Attorney-General* v. *Niagara Falls International Bridge Co.*—Chy., Ont. . . i. 813

——— 2. An Act of the Dominion Parliament incorporating a company for the purpose of constructing a bridge across the Niagara River from Canada to the United States, directed that the bridge should be "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The bridge was completed for railway purposes only, and the time limited by the charter for completing the work having elapsed, an information was filed in the name of the Attorney-General of Ontario, seeking to enforce the terms of the charter, or for the removal of the bridge as a nuisance: *Held* by the Court of Appeal, reversing the decision of Spragge, C., that the bridge as constructed not being a public nuisance the Attorney-General of Ontario was not the proper officer to file the information.—*Attorney-General* v. *International Bridge Co.*—C. A., Ont. . . . ii. 559

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BANKRUPTCY AND INSOLVENCY.—The Act of the Legislature of Quebec (33 *Vict. c.* 58) for the relief of the appellant society then (as appeared on the face of the Act) in a state of extreme financial embarrassment is within the legislative capacity of that Legislature. The Act was held to relate to a matter of a "merely local or private nature in the Province," which by the 92nd section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada. — *L'Union St. Jacques de Montreal* v. *Belisle*.—P. C. . . i. 63

——— 2. The B.N.A. Act, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion Enactment, 40 *Vict. c.* 41, *s.* 28, providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i. e.*, not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the Provincial Legislatures by section 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, quœre, what powers may be possessed by the Parliament of Canada so to do. *Cuvillier* v. *Aylwin* (2 Knapp's P. C. C. 72) reviewed.—*Cushing* v. *Dupuy*.—P. C. . . . . i. 252

——— 3. Section 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the County Court or by the County Court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.—*Crombie* v. *Jackson*.—Q. B., Ont. . i. 685

——— 4. An Act of the Dominion assuming to provide for the liquidation of all building societies in the Province of Quebec, whether solvent or not was held to be beyond the competence of the Dominion Parliament. — *McClanaghan* v. *The St. Ann's Mutual Building Society*.—Q. B., Quebec. . . . . ii. 237

——— 5. An official assignee, or his agent, acting under an Insolvent Act of the Parliament of Canada, can sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a Provincial enactment. The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 *Vict. c.* 16, and to restrain the powers of assignees in putting that Act in operation is invalid.—*Coté* v. *Watson*.—Superior Ct., Quebec . . ii. 343

——— 6. Section 59 of the Dominion Insolvent Act of 1869 provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if, before the payment over to the plaintiff of the moneys levied. the estate of the debtor had been assigned or placed in liquidation under that Act: *Held* to be within the competence of the Dominion Parliament —*Kinney* v. *Dudman*.—Supreme Ct., N. S. . ii. 412

——— 7. An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he was confined, on proof that he is unable to pay his debts, and that he has made no

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fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass, since the B. N. A. Act came into force, and the assent of the Governor-General does not make such an enactment valid.—*The Queen* v. *Chandler*.—Supreme Ct., N. B. ii. 421

——— 8. The Legislature of New Brunswick, prior to the union, passed an Act extending the gaol limits. This Act was not to come into operation until April 1st, 1868, and before that date, but after the union, it was repealed by a subsequent enactment: *Held*, that the subject of gaol limits does not so relate to insolvency as to make the repealing Act *ultra vires*. — *McAlmon* v. *Pine*.— Supreme Ct., N.B. . . . ii. 487

——— 9. An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be *ultra vires*, as respects a party not shewn to be a trader or subject to the Dominion Insolvent Act.—*Armstrong* v. *McCutchin*.—Supreme Ct., N. B. . . . . ii. 494

——— 10. An Act of the Legislature of New Brunswick providing that as against the assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the Legislature.—*In re De Veber*. —Supreme Ct., N. B. . . ii. 552

——— 11. The Dominion Parliament, by its Insolvent Act of 1875, enacted that any person who purchased goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact with intent to defraud, and who does not afterwards pay the debt, shall be held guilty of a fraud and be liable to imprisonment for two years unless the debt and costs are sooner paid, provided that in the suit for the recovery of the debt, the defendant is charged with the fraud and declared guilty of it by the judgment rendered in the suit. The plaintiff sued for goods sold and delivered to the defendants who afterwards became insolvent under the Act, and charged them with fraud in the terms of the Act: *Held* by a majority of the Judges of the Common Pleas, by two Judges of the Court of Appeal, and by three Judges of the Supreme Court (the other three giving no opinion on this point), that the enactment

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is within the competence of the Dominion Parliament.—*Peck* v. *Shields*. —C. A., Ont. . . . . iii. 266

——— 12. An Act of the Nova Scotia Legislature for facilitating arrangements between Railway Companies and their creditors, provided that a company might propose a scheme of arrangement between the company and its creditors and file the same in Court and that thereafter the Court might, on application by the company, restrain any action against the company on such terms as the Court might think fit. The Act also provided that notice of filing the scheme should be published, and that thereafter no execution, attachment, or other process against the property of the company, should be available or be enforced without leave of the Court: *Held*, by Ritchie, J., that the above provisions related to bankruptcy and insolvency, and were in excess of the powers vested in a Provincial Legislature.—*Murdoch* v. *Windsor & Annapolis Railway Co.*—Supreme Ct., N. S. . . . . iii. 368

——— 13. By An Act of the Legislature of Nova Scotia, provision was made for the winding-up of companies in general, where a resolution to that effect was passed by the company, or where the Court so ordered at the instance of a contributor, on its being made to appear that such order was just and equitable. The Act could be enforced although no debts were due by the company, but could not be called into operation by a creditor: *Held*, that the Act did not partake of the character of an insolvent law, and was within the legislative authority of a Provincial Legislature.—*In re The Wallace Huestis Grey Stone Co.* —Supreme Ct., N. S. . . iii. 374

——— 14. Under the provisions of an Act of the Legislature of Nova Scotia, "to facilitate arrangements between Railway Companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B debenture stock of the company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted: *Held* (Weatherbe, J., dissenting) that so much of the Act as was necessary to

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the confirmation of the proposed scheme was within the legislative authority of the Legislature of Nova Scotia.—*Re Windsor & Annapolis Railway.*—Supreme Ct., N. S. . iii. 387

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——— Transfer of Warehouse Receipts.
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BILLS OF LADING AND WAREHOUSE RECEIPTS.—A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any bill of lading, or to the endorsee thereof, to whom the property in the goods should be transferred by such consignment or endorsement, and that every such instrument representing goods to have been shipped should, in the hands of a consignee or endorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held not to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce.—*Beard* v. *Steele.*—Q. B., Ont. . . . . i. 683

——— 2. The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subject assigned to it by the B. N. A. Act. Per Spragge, C.: The Dominion Act, 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers assigned to the Dominion Parliament and is valid.—*Smith* v. *The Merchants' Bank.**—Chy., Ont. i. 828

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COMPANIES.—The Dominion Parliament has no power to incorporate an association for the purpose of buying, leasing, and selling landed property and buildings, the operations of a society for such purpose affecting exclusively property and civil rights within the Province where they are carried on; and therefore the Act 37 Vict. c. 103, incorporating the Colonial Building and Investment Association for such objects, was held to be *ultra vires*, though power was given by said Act to carry on operations throughout the Dominion. Monk, J., dissenting.—*Loranger* v. *The Colonial Building and Investment Association.*—Q. B., Quebec . . ii. 275

——— 2. *Held* that Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as *ultra vires* of the said Parliament: *Held*, further, that the corporation could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. *Loranger* v. *The Colonial Building and Investment Association,*

* This decision was reversed by the Court of Appeal, 8 A. R. 15, on other grounds, but the decision of the Court of Appeal was subsequently reversed by the Supreme Court, 8 S. C. R. 512. In the Court of Appeal, Armour, J., held that the provision in question was invalid, while in the Supreme Court, Fournier, Henry and Taschereau, JJ., held the contrary.

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reversed.—*Colonial Building and Investment Association* v. *Attorney-General of Quebec*—P.C. . . iii. 118

——— 3. A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise. The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.—*Clarke* v. *Union Fire Insurance Co.*—Master's Office, Ont. . . . . iii. 335

CONTRACTS—Regulation. . i. 265
See TRADE AND COMMERCE, 1.

COPYRIGHT—*Right to legislate as to.*]—The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures. All that the B. N. A. Act intended to effect by s. 91, sub-s. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to Confederation. The Imperial Copyright Act, 5 & 6 Vict. c. 45, was in force in Canada at the time of Confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force.—*Smiles* v. *Belford*—C. A., Ont. . . . i. 576

COUNTY COURT JUDGE.—By the B. N. A. Act, 1867, sect. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of

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County Court Judges by the Lieutenant Governor for incapacity or misbehaviour and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against County Court Judges. A County Court Judge may be removed by the Governor-General in Council under the Imperial Act, 22 Geo. III. c. 75, but there is no power under that Act, or the Con. Stat. C. c. 13, or under the Common Law, to issue a commission for a preliminary enquiry under oath with respect to such charges.—*Re Squier*—Q. B., Ont. . . . . i. 789

——— Power to confer jurisdiction on. ii. 665; iii. 319
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——— Power to constitute . i. 557
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——— Power to impose duties on. i. 158
See PROVINCIAL COURTS.

CRIMINAL LAW.—An information under an Ontario Act for selling intoxicating liquors on Sunday was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself.—*Regina* v. *Roddy* . . . . . i. 709

——— 2. A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction. In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences at common law. Section 57 of the Liquor License Act of Ontario, R. S. O. c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of $50, was therefore held to be invalid.—*Regina* v. *Lawrence*—Q. B., Ont. . . i. 742

——— 3. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has

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authority to enact. Breach of a Provincial Statute is not a "crime" within the meaning of s. 91, sub-s. 27 of the B.N.A. Act.—*Pope* v. *Griffith.* —Q. B., Quebec . . . ii. 291

——— 4. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. A Statute of Quebec having provided that no proceedings in civil matters before a District Magistrate should be removed to any other Court by *certiorari* or otherwise, it was held that a proceeding before a District Magistrate for the enforcement of penalties under the Licence Law of the Province was a civil proceeding within this enactment, and that the right to *certiorari* was taken away.—*Ex parte Duncan.*—Superior Ct., Quebec. ii. 297

——— 5. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.—*Page* v. *Griffith.*—Q. B., Quebec . . ii. 308

——— 6. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. An enactment of the Quebec Legislature prescribing the mode in which penalties for violations of a Statute of the Province (41 Vict. c. 3) are to be enforced, was held to be valid.—*Coté* v. *Chauveau.*—Superior Ct., Quebec, ii. 311

——— 7. A Provincial Legislature has power to pass an enactment for the imprisonment of a person making default in payment of a sum due on a judgment in case (*a*) he has had since the date of the judgment or order, the means to pay the sum in respect of which he has made default and neglects or refuses to pay it, or in case (*b*) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally. Weldon, J., dissenting.—*Ex parte Ellis.*—Supreme Ct., N.B. . . . . ii. 527

——— 8. An Act of the Parliament of Canada provided in regard to appeals from summary convictions made by Justices of the Peace, that the parties might dispense with a jury if they thought fit, and submit themselves to the judgment of the Court appealed to without a jury: *Held*, that this enactment was not an interference

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with the "constitution" of the Court (in relation to which the Provincial Legislatures have exclusive jurisdiction), but that it related to criminal law and procedure in criminal matters, and therefore was within the jurisdiction of the Dominion Parliament.—*Regina* v. *Bradshaw.*—Q. B., Ont. . . . . ii. 602

——— 9. By a Dominion Statute "for avoiding doubt," it was declared and enacted, "that every person qualified and summoned as a Grand Juror or as a Petit Juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before, or be passed after the coming into force of the B.N.A. Act, 1867, subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act." Acts were afterwards passed by the Ontario Legislature changing the mode of selecting jurors in that Province: *Held*, that the Dominion enactment was not an unconstitutional delegation of legislative authority and was not *ultra vires*, and that a selection of jurors made in the manner prescribed by the Ontario Acts was valid for the purpose of a criminal trial.—*Regina* v. *O'Rourke.* —Q. B. D., Ont. . . . ii. 644

——— 10. The Acts relating to the attendance of grand and petit jurors at the County Courts (Courts of criminal jurisdiction over all crimes which are not capital), are within the powers of the Local Legislature, under the B.N.A. Act, 1867, sect. 92, as pertaining to the "Administration of Justice" and the "Constitution and organization of Provincial Courts," and do not belong to the Parliament of Canada, under sec. 91, as "Procedure in criminal matters." —*Regina* v. *Foley.*—Supreme Ct., N.B. . . . . ii. 653, *n*

——— 11. By the Act 32 and 33 Vict., c. 31, s. 78 (D), it is provided that penalties against Justices of the Peace for the non-return of convictions may be recovered in an action of debt by any person suing for the same in any Court of Record: *Held*, that this provision was within the competence of the Dominion Parliament, and that a Provincial enactment, declaring that County Courts

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should not have jurisdiction in such actions, was thereby overborne.—*Ward* v. *Reed*.—Supreme Ct., N.B. . . . . iii. 405
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See TEMPERANCE ACT OF 1864, 3.
DEBTOR.—*Power to provide for discharge of.*—By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process from any Court was entitled to apply for and obtain his discharge. When this Act was passed there were no County Courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions applicable to persons imprisoned under process from the County Courts, and this enactment was held to be valid..—*Johnston* v. *Poyntz*.—Supreme Ct., N.S. . ii. 416
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DELEGATION.—Subjects which in one aspect and for one purpose fall within sect. 92 of the B.N.A. Act, 1867, may in another aspect and for another purpose fall within sect. 91. *Russell* v. *The Queen* (7 App. Cas. 829) explained and approved. *Held*, that "The Liquor License Act of 1877," c. 181, Revised Statutes of Ontario, which, in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with the general regulation of trade or commerce, but comes within Nos. 8, 15 and 16 of sect. 92 of the Act of 1867, and is within the powers of the Provincial Legislature.—*Held*, further, that the Provincial Legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Hodge* v. *The Queen*.—P. C. . iii. 144
——— 2. Act No. 22 of 1869, of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council. The 9th sect. of that Act which confers upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. *Regina* v. *Burah*—P. C. iii. 409
——— 3. A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted. *Held*, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act, (Scheduled to 18 and 19 Vict., c. 54, ss. 1 and 45): *Held*, further, that duties levied by an Order in Council issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor.—*Powell* v. *Apollo Candle Co.*—P. C. . . . . iii. 432
——— Selection of Jurors, ii. 644
See CRIMINAL LAW, 9.
DENOMINATIONAL SCHOOLS—A Provincial Legislature may legislate in regard to Separate Schools, provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province at the time of Confederation are not prejudicially affected by such legislation. The B. N. A. Act provides by sub-s. 3 of s. 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education:" *Held*, that this enactment gives an appeal in respect of those decisions alone which are

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legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school. In election matters Separate Schools have the same right of appeal to a County Judge as Public Schools have. —*Separate School Trustees of Belleville* v. *Grainger*—Chy., Ont. . . i. 816

——— 2. The provisions contained in sect. 93 of the B. N. A. Act, that nothing in any law made by a Province in relation to education "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," protect those legal rights and privileges only which existed in each Province at the Union by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right. At the Union the law with respect to the schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools, and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid. The constitutionality of the Act 34 Vict. c. 21, cannot be affected by any regulations of the Board of Education made under its authority; and semble, if the Board of Education have made regulations which they ought not to have made, or have not made regulations which they should have made, the case falls within sub-s. 4 of sect. 93 of the B. N. A. Act.— *Ex parte Renaud* — Supreme Ct., N. B. . . . . ii. 445

DIRECT TAXATION—Power to impose. . . . . i. 95, 117
See TAXATION, 1, 2.

DIVISION COURTS—Appointment of Judges. . . . . ii. 665
See JUDGES, 2.

DOMINION CONTROVERTED ELECTIONS ACT—Election Courts. . . . . i. 158
See PROVINCIAL COURTS.

DOMINION OFFICER—*Seizure of salary of.*]—A Provincial Legislature has no power to declare liable to seizure the salaries of employees of the Federal Government.—*Evans* v. *Hudon*—Superior Ct., Quebec . ii. 346

——— Taxation of income. . . i. 592
See TAXATION, 3.

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DOMINION GOVERNMENT—*Jurisdiction and Property.*] Under the B. N. A. Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the Province. The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871. *Quære*, whether it was *ultra vires* of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement. But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise.—*Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.*—P. C. . . i. 397

——— 2. *Held*, following the case of the Commissioners of the Cobourg Town Trust, 22 Grant 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government; as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered.—*Re Toronto Harbour Commissioners.*— Chy., Ont. . . . . i. 825

——— Public Harbours . . ii. 147
See HARBOURS.

——— Statutes.
See STATUTES.

DOMINION RAILWAY.—Power to transfer. . . . . i. 233
See PROVINCIAL LEGISLATURES, 2.

EDUCATION.—Denominational and Separate Schools . i. 816; ii. 445
See DENOMINATIONAL SCHOOLS.

——— Imperial Law. . . i. 761
See MEDICAL PRACTITIONER.

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ELECTIONS TO PARLIAMENT.—An Act of Canada passed before 1867 made void any contract referring to or arising out of a Parliamentary election, even for payment of lawful expenses; the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision: *Held*, that this provision not having been repealed, was in force in Quebec as respects Dominion elections under ss. 41 and 129 of the B. N. A. Act, and that therefore a promissory note given for the expenses of a subsequent Dominion election was void.—*Willett* v. *DeGrosbois*.—Superior Ct., Quebec . . . . . ii. 332

ESCHEAT.—Lands in the Province of Ontario escheated to the Crown for defect of heirs belong to the Province and not to the Dominion. At the date of passing the B. N. A. Act the revenue arising from all escheats to the Crown within the then Province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act vested in the Dominion the general public revenues, as then existing in the Provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the Provinces—the words "lands, mines, minerals and royalties" therein including, according to their true construction, royalties in respect of lands such as escheats.—*Attorney-General* v. *Mercer*.—P. C. . . . . iii. 1

EVIDENCE.—Per Torrance, J. The Dominion Parliament can confer authority upon Courts and Judges in Canada, to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any British or Foreign tribunal; and the Dominion Act, 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid.—*Ex parte Smith*—Superior Ct., Quebec . . . ii. 330

——— 2. The taking of evidence to be used in an action pending in a foreign tribunal is of extra Provincial pertinence, and does not fall within the exclusive legislative authority of the Provinces; the Dominion Act, 31 Vict. c. 76, providing for the taking of such evidence by Provincial Courts, was therefore held to be valid.—*Re Wetherell and Jones*—Ch. D., Ont. . . . . iii. 315

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——— In Criminal Matters. . i. 709
See CRIMINAL LAW, 1.

EX POST FACTO LAW.—Power to enact. . . . . ii. 678
See TEMPERANCE ACT OF 1864, 4.

EXTRADITION.—The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding that the B.N.A. Act, previously passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties.—*Ex parte Worms*.—Q. B., Quebec. . ii. 315

FEDERAL COMPANY.—Power to dissolve or transfer . . . . i. 233
See PROVINCIAL LEGISLATURES, 2.

FINE AND IMPRISONMENT.—Power of Provincial Legislature to authorize punishment of same offence by both modes.—*Ex parte Papin*.—Superior Ct., Quebec. . . ii. 320
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Paige v. *Griffith* ii. 324

FINES AND PENALTIES.—The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.—*Bennett* v. *Pharmaceutical Association of Quebec* . . . . . ii. 250

FIRE INSURANCE.—Regulation of contracts . . . . . i. 265
See TRADE AND COMMERCE, 1.

——— Tax on Policies . . i. 117
See TAXATION, 2.

FIRE MARSHALS.—Constitution of Court . . . . . i. 57
See PROVINCIAL LEGISLATURES, 1.

FISHERIES.—The B. N. A. Act in assigning to the Parliament of Canada the right to legislate with respect to Sea Coast and Inland Fisheries, did not thereby give authority to deal with questions of property and civil rights, such as the ownership of the beds of the rivers, or of the fisheries, or the right of individuals therein. What the Act gave to Parliament was a right to legislate in regard to matters of national and general concern, such as forbidding fish to be taken at improper seasons, or in an improper manner, or with destructive instruments—such general laws as are for the benefit of the public at large as well as of the owner. Under the B.N.A. Act the exclusive rights of fishing vested in the proprietors of non-navigable rivers being in every sense of the word "property," can be interfered with only by the Provincial Legislatures in exercise of the powers

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given to them to legislate respecting property and matters of a local or private nature. The rights of the Provincial Governments in respect of fisheries in non-navigable waters, the beds of which, not having been granted before Confederation, were then vested in the Provinces as part of the public domain, do not differ from the rights of private owners which had been acquired by grant from the Crown before that date, and a lease made by the Minister of Marine and Fisheries of a non-navigable portion of a river in the Province of New Brunswick, passing partly through granted and partly through ungranted lands, was therefore held to be void.—*The Queen* v. *Robertson.* —Supreme Ct., Can. . . ii. 65

GAOL LIMITS.—Power to alter. ii. 487
See BANKRUPTCY AND INSOLVENCY, 8.

GOVERNOR-GENERAL. — Appeal under B. N. A. Act, sect. 93 . i. 816
See DENOMINATIONAL SCHOOLS, 1.

——— Authority as to issue of Commissions . . . . i. 722, 789
See PREROGATIVE, 1.
COUNTY COURT JUDGE.

HARBOURS.—The "Public Harbours," which by the B. N. A. Act are declared to be the property of the Dominion, include all harbours, together with the bed and soil thereof, which the public have the right to use, and are not limited to such as at the time of Confederation had been artificially constructed or improved at the public expense; and where a grant of part of the foreshore of a natural harbour used as such by the public, was made by the Provincial Government of Prince Edward Island subsequent to the admission of that Province into the Union, the grant was held to be invalid.—*Holman* v. *Green.* — Supreme Ct., Can. . . . . ii. 147

HARD LABOUR. — A Provincial Legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them.—*Regina* v. *Frawley.*—C. A., Ont. . . . . ii. 576

——— 2. "Imprisonment" in No. 15 of section 92 of the Act of 1867 (B. N. A. Act) means imprisonment with or without hard labour.—*Hodge* v. *The Queen.*—P. C. . . iii. 144

IMPERIAL ACTS.
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IMPRISONMENT.—Power to fine and imprison for same offence . . . . . ii. 320, 322, 324
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——— Power to impose hard labour . . . . . ii. 576; iii. 144
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IMPRISONMENT FOR DEBT.—Discharge of debtor . ii. 416, 421
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——— Power to abolish . . ii. 494
See BANKRUPTCY AND INSOLVENCY, 9.

———Power to impose. . . ii. 527
See CRIMINAL LAW, 7.

INDIAN LANDS.—Those "lands reserved for the Indians," which by s. 91, sub-s. 24, of the B. N. A. Act, are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use and do not include lands to which the Indian title has been extinguished. The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold; all unpatented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation.—*Church* v. *Fenton.*—C. P., Ont. . . . i. 831

INFORMATION.—Nuisance i. 813; ii. 559
See ATTORNEY-GENERAL.

INJURY TO PUBLIC.—Proper officer to complain of . . . i. 813
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INSOLVENCY.
See BANKRUPTCY AND INSOLVENCY.

INSURANCE.—Regulation of contracts . . . . . i. 265
See TRADE AND COMMERCE, 1.

——— Tax on Policies . . i. 117
See TAXATION, 2.

INTEREST.—The general law having limited the rate of interest, in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase being but another name for interest. A municipal corporation was authorized by an Act in force at the time of Confederation, to charge ten per cent.

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on overdue assessments; the Legislature of Quebec passed an Act repealing this enactment, and providing anew for a similar charge: *Held*, by Johnson, J., that the former enactment was effectually repealed, and that the new enactment as to increase was invalid.—*Ross* v. *Torrance*.—Superior Ct., Quebec . . . ii. 352

——— 2. The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Legislature. A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons having the right to borrow.—*Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.*—Superior Ct., Quebec. . ii. 361

INTOXICATING LIQUORS.—An Act of the Parliament of Canada prohibited the traffic in intoxicating liquors, except under certain restrictions, in any county or city the inhabitants of which chose to take the steps therein prescribed for the adoption of its provisions: *Held*, by the Privy Council, that such an Act was within the jurisdiction of the Dominion Parliament.—*Russell* v. *The Queen*.—P. C. . . . ii. 12

——— 2. The state of things existing in the confederated Provinces at the time of Confederation, and more particularly that which was recognized bylaw in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act. At the time of Confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal institutions" contained in sect. 92, subsect. 8, of the B.N.A. Act. The Provincial Legislatures have the power

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for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion. — *Corporation of Three Rivers* v. *Sulte*. — Q. B., Quebec . . . . . ii. 280

——— 3. The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors. The provision of the Quebec Statute, 38 Vict. c. 74, s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from eleven of the clock at night, until five of the clock in the morning, is within the competence of a Provincial Legislature.—*Blouin* v. *Corporation of Quebec*—Superior Ct., Quebec . . . . . ii. 368

——— 4. Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils.—*De St. Aubyn* v. *Lafrance*.—Circuit Ct., Quebec. ii. 392

——— 5. A Statute of Nova Scotia, passed after Confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the grand jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before Confederation: *Held*, that the Act in question was not *ultra vires* of the Legislature. *Held*, further, that if the restrictions were *ultra vires*, the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or release from the statutory penalty thereby incurred. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever

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may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby. *Keefe* v. *MeLennan*—Supreme Ct., N.S. . . . ii. 400

——— 6. A New Brunswick statute, 36 Vict. c. 10, empowered the General Sessions of the Peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a *mandamus* was granted for the purpose of compelling them to issue a license to the applicant. The Legislature of New Brunswick by an Act subsequent to Confederation declared that "no license for the sale of spirituous liquors shall be granted or issued within any parish or municipality in the Province when a majority of the ratepayers, residents in such parish or municipality, shall petition the Sessions or municipal council against issuing any license within such parish or municipality." Prior to Confederation, there had been no legislation of this character in New Brunswick, and this enactment was held by the Supreme Court of that Province to be beyond the competence of the Legislature.—*Regina* v. *Justices of Kings*—Supreme Ct., N. B. . . . . ii. 499

——— 7. The Provincial Legislatures have authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at special times. The Statute 42-43 Vict. c. 4 (Quebec) which requires houses in which spirituous liquors, etc., are sold, to be closed during the whole of Sunday, and on every other day between 11 p.m. and 5 a.m. is valid. (Ritchie, C.J., and Strong and Fournier, JJ.)—*Poulin* v. *Corporation of Quebec*—Supreme Ct., Can. iii. 230

——— Criminal offence. . ii. 606, 616
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——— Licenses.
See LICENSES.

JUDGES.—*Jurisdiction respecting*]—By an Act of the Legislature of New Brunswick since Confederation, 39 Vict. c. 5, it was provided that Courts should be established for the trial of civil causes before Commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the Commissioners was limited to $40

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in actions of debt, and $16 in actions of tort; and was further restricted in special cases. On an application to set aside a judgment obtained before a Commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act, a Lieutenant-Governor had no power to appoint Judges of any kind, the New Brunswick Act was held to be valid. Allen, C. J., and Duff, J., dissenting.—*Ganong* v. *Bayley*—Supreme Ct., N.B. . . . ii. 509

——— 2. In the Province of Ontario there were in existence at the Union, in addition to the Superior and County Courts, other Courts styled Division Courts, for the trial of small causes; of these Division Courts there were several in every county; and they had since their establishment been always presided over by the County Court Judges. An Ontario Statute, passed after the Union, provided in effect that two or more Counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and the Act conferred on the County Court Judges of grouped Counties, the same authority to try suits in each of the grouped Counties, as they possessed in their own Counties respectively: *Held*, that the Provincial Legislature had complete jurisdiction over the Division Courts, and could appoint the officers to preside over them, and that the enactment in question, as regarded these Courts, was valid. Armour, J., dissenting. *Wilson* v. *McGuire*—Q. B. D., Ont. ii. 665

——— 3. An Act of the Ontario Legislature provided that the County Judge of one County might preside at the Sessions in a County other than that of which he was Judge: *Held*, by Armour and O'Connor, JJ., (Wilson, C. J., doubting), that this enactment was not within the competence of the Legislature.—*Gibson* v. *McDonald*—Q. B. D., Ont. . iii. 319

——— Commission of enquiry . i. 789
See COUNTY COURT JUDGE.

JURORS—Selection of . ii. 644, 653, *n.*
See CRIMINAL LAW, 9, 10.

JUSTICES OF THE PEACE.—An Act of the old Province of Canada authorized the Governor to appoint Police Magistrates; the Act was temporary: *Held*, that an Act of the Ontario Legislature, continuing the same in force, was valid.—*The Queen* v. *Reno and Anderson*—Q. B., Ont. . . . . i. 810

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——— 2. Under the B. N. A. Act, the right to appoint Magistrates, such as District Magistrates, in the Province of Quebec, is vested in the Provincial Executives; and this right is not affected by the provisions contained in sections 90 and 130 of that Act.—*Regina* v. *Horner*—Q.B., Quebec ii. 317

———3. The right of the Provincial Legislatures to legislate in relation to the Administration of Justice, includes a right to make provision for the appointment of Police Magistrates and Justices of the Peace by the Lieutenant-Governor.—*Regina* v. *Bennett*—Q. B. D., Ont. . . . ii. 634

LEGISLATIVE POWER.—The B. N. A. Act in assigning either to the Dominion or Provincial Legislatures, power to legislate on any particular subject, gives at the same time all the incidental subjects of legislation necessary to the exercise of the power so assigned. *Bennett* v. *Pharmaceutical Association of Quebec.*—Q. B., Quebec. . . . . ii. 250

LEGISLATURES OF ONTARIO AND QUEBEC—The powers conferred by the B. N. A. Act, 1867, s. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867. The Act 22 Vict. c. 66, of the Province of Canada, which created a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the B. N. A. Act, be repealed or modified by the Legislature of either of these Provinces, or by the conjoint operation of both Provincial Legislatures, but only by the Parliament of the Dominion. The Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation which had been created by the Parliament of the Province of Canada before the B. N. A. Act, and to substitute a new corporation; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was held invalid. *Citizens Insurance Company of Canada* v. *Parsons* (7 App. Cas. 96), approved and distinguished.—*Dobie* v. *The Temporalities Board.*—P.C. . . . . i. 351

See PROVINCIAL LEGISLATURES.

LICENSES — *Power to make laws respecting*—The right conferred on Provincial Legislatures by sub-s. 9 of s. 92, of the B. N. A. Act, to deal with "shop, saloon, tavern, auctioneer, and other licenses," does not extend to licenses on brewers. *Regina* v. *Taylor* (36 U. C. Q. B. 218), overruled. Ritchie and Strong, JJ., dissenting. — *Severn* v. *The Queen.*—Supreme Ct., Can. . . i. 414

———2. The Legislature of Ontario having passed an Act to regulate tavern and shop licenses: *Held*, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should, on conviction, be imprisoned in the common gaol for three months; and that such enactment was not opposed to sect. 91, sub-s. 27, of the B. N. A. Act, by which criminal law is assigned exclusively to the Dominion Parliament.—*Regina* v. *Boardman.*—Q. B., Ont. . . . . i. 676

———3. The B. N. A. Act in conferring legislative jurisdiction over particular subjects, must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted; consequently, the right conferred on Provincial Legislatures to make laws in relation to shop, saloon, tavern, auctioneer and other licenses includes the right of imposing penalties for violating the provincial laws in relation to those subjects. Provincial enactments by which persons who sell liquor by wholesale are required to take out a license are not invalid as an interference with trade and commerce.—*Ex parte Leveillé*—Superior Ct., Quebec . . ii. 349

——— 4. Provincial Legislatures can impose fines and penalties for selling liquor without license.—*Regina* v. *McMillan.*—Supreme Ct., N. B. . ii. 489

——— 5. Per Spragge, C.J.: The jurisdiction of a Provincial Legislature to legislate respecting licenses is not confined to the object of raising a revenue.—*Regina* v. *Frawley.*—C. A., Ont. . . . . ii. 576

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LOCAL AND PRIVATE MATTERS.—Insolvency. . . i. 63
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—— Taxation . . . i. 95
See TAXATION, 1.

LOCAL WORKS AND UNDERTAKINGS.—By an Act of the Province of New Brunswick, passed prior to Confederation, the plaintiff company was incorporated for the purpose of constructing a railway from the City of St. John, in that Province, westward to the boundary of the United States. After Confederation another Act (32 Vict. c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the company, and this latter Act was held to be within the competence of the Provincial Legislature. The fact of the legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting with a Provincial railway, does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province.—*European and North American Railway Co.* v. *Thomas.*—Supreme Ct., N. B. . . ii. 439

—— 2. All works which are wholly within one Province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of the Province in which they are situate, unless they are by the Parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. The Dominion Parliament cannot without such declaration, authorize a company to establish in two or more Provinces, works, needing special legislative authority, and which are in their nature local in each Province, the jurisdiction in such case to give the needed authority, being determined by the location and object of the works, and not by the circumstance that the company is authorized to make them in several Provinces. A company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Canada, or of two or more of the Provinces, and in the absence of these conditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns, was invalid.—*Regina* v. *Mohr.*—Q. B., Quebec . . ii. 257

MAGISTRATES.—Appointment of.
See JUSTICES OF THE PEACE.

MARITIME COURT.—The Act 40 Vict. c. 21, D., establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament.—*The Picton.*—Supreme Ct., Can. . . . . i. 557

MARKETS.—Power to regulate. i. 756
See MUNICIPAL INSTITUTIONS, 2.

MATTERS OF A MERELY LOCAL OR PRIVATE NATURE.—Direct taxation for local purpose. i. 95

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See MUNICIPAL INSTITUTIONS, 1.

MEDICAL PRACTITIONER.—*Registration.*]—The Imperial Parliament having enacted since Confederation, that any person registered as a medical practitioner under the English Medical Act (21 and 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration and that the term "colony" shall include any of Her Majesty's possessions which have a legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the Confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to

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education.—*Regina* v. *College of Physicians and Surgeons, Ontario*,—Q. B. Ont. . . . . i. 761

MILITARY AND NAVAL SERVICE.—The Parliament of Canada has, under the B. N. A. Act, exclusive jurisdiction in matters relating to militia, military and naval service, and defence, and consequently, the provisions of the Imperial Army Act, 1881, do not apply to Canada, so as to make persons not connected with the active militia of the Dominion liable in respect of acts which are offences under the Imperial Act, but not under the Militia Act of Canada. —*Holmes* v. *Temple*.—Sessions of the Peace, Quebec. . . . ii. 396

MUNICIPAL INSTITUTIONS.—Under the exclusive legislative authority given to it with regard to "Municipal Institutions" and to "matters of a merely local or private nature in the Province," a Provincial Legislature can confer on municipal corporations power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses; and the conferring such power is not an interference with "the regulation of trade and commerce," assigned exclusively to the Dominion Parliament.—*Slavin* v. *Village of Orillia*.—Q.B., Ont. i. 688

——— 2. The provision contained in the Municipal Act of Ontario, authorizing city councils to pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto," is not *ultra vires* of the Ontario Legislature, as being a regulation of trade and commerce. In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of Confederation.—*Harris* v. *City of Hamilton*.—Q. B., Ont. . . . . i. 756

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NAVIGATION AND SHIPPING—The power to incorporate a navigation company the operations of which are limited to a particular Province, belongs exclusively to the Legislature of such Province.—*Macdougall* v. *The Union Navigation Co.* Q. B., Quebec. . . . . ii. 228

——— 2. The Government of the Province of Quebec having by Letters Patent granted a water lot extending into deep water, at the mouth of the River St. Maurice, the Letters Patent were held to be valid, subject to an implied restriction that the requirements of navigation and commerce were not to be interfered with or injured thereby.—*Normand* v. *The St. Lawrence Navigation Co.*—Q. B., Quebec. ii. 231

——— 3. The Dominion Parliament can confer on the Vice-Admiralty Courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion. When an Act of the Parliament of Canada is in part repugnant to an Imperial Statute, effect will be given to the former so far as its provisions do not conflict with those of the Imperial enactment. — *The Farewell* — Vice-Admiralty Ct., Quebec. . . ii. 378

——— 4. A Provincial enactment authorizing the erection of booms in a navigable river does not conflict with the power of the Parliament of Canada with respect to navigation and shipping under sect. 91 of the B. N. A. Act the words navigation and shipping being employed in that section in the sense in which they are used in the several Acts of the Imperial Parliament relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vict. c. 58, viz.: As giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not as excluding for all purposes Provincial jurisdiction over navigable waters. *McMillan* v. *Southwest Boom Co.*—Supreme Ct., N. B. . . . . ii. 542

——— 5. A Provincial Legislature may incorporate a boom company, but cannot confer upon the company power to obstruct the navigation of a tidal and navigable river, Taschereau, J., doubting. *McMillan* v. *Southwest Boom Co.*, (1 P. & B. 715), overruled in part. *Queddy River Driving Boom Co.* v. *Davidson*—Supreme Ct., Can. . . iii. 243

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NUISANCES — The power of the Parliament of Canada to enact a general law of nuisances, as incident to its right to legislate as to criminal law, is not incompatible with a right in the Provincial Legislatures to authorize municipal corporations to pass by-laws against nuisances hurtful to public health, as incidental to municipal institutions. — *Ex parte Pillow*—Superior Ct., Quebec. iii. 357

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PATENT OF INVENTION.—Proceedings in the nature of a *scire facias*, to set aside Letters Patent of invention issued under the Dominion Statute, 35 Vict. c. 26, cannot be instituted in the name of a Provincial Attorney-General, and can only be legally brought by the Attorney-General of Canada. *Mousseau* v. *Bate*—Court of Review, Quebec. . . . iii. 341

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See JUSTICES OF THE PEACE, 1.

PREROGATIVE OF THE CROWN —The provisions of the B. N. A. Act have not superseded the prerogative right of the Crown to issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer and General Gaol Delivery, for trial of felonies, etc.; and such a commission by the Deputy of the Governor-General was held to be legal. Per Wilson, J.—The Lieutenant-Governor, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize. *Regina* v. *Amer*—Q. B., Ont. . i. 722

——— 2. The petitioner having been declared duly elected a member to represent the Electoral District of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council: *Held*, that such application must be refused. Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the Act was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit an appeal contrary to the intention of the Act.—*Théberge* v. *Landry*—P. C. . . . . ii. 1

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PROHIBITORY LIQUOR LAW.—Power to enact or repeal. . ii. 12
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See INTOXICATING LIQUORS, 1, 2, 4. TEMPERANCE ACT OF 1864, 2, 5.

PROPERTY AND CIVIL RIGHTS. —An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain Municipalities to exact tolls on a toll-bridge, for default in making repairs, and to transfer the property to others, was held valid, as the matter related to property and civil rights and was of a merely local nature.—*Municipality of Cleveland* v. *Municipality of Melbourne and Brompton Gore.*—Q. B., Quebec ii. 241

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——— 2. *Quære*, whether the Dominion Act, 32--33 Vict. c. 29, s. 134, relating to costs in actions against Justices, is not *ultra vires* of the Federal Parliament as relating to procedure in a civil matter.—*Whittier* v. *Diblee*.—Supreme Ct., N.B. ii. 492

——— 3. The jurisdiction of the Provincial Legislatures over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Elections Act, 1874, by section 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's Courts in the Province in which the cause of action arose, having competent jurisdiction: *Held*, that this enactment was valid.—*Doyle* v. *Bell*.—C. A., Ont. . . . iii. 297

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See FISHERIES.

——— Regulation of Trade and Commerce . . . . . i. 265
See TRADE AND COMMERCE, 1.

PROVINCIAL COURTS.—*Power to impose duties on.*] The Parliament of the Dominion of Canada has power to impose new duties upon existing Provincial Courts, and to give them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction, consequently the Dominion Controverted Elections Act of 1874 (Canadian Stat. 37 Vict. c. 10), which confers upon the Provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, is valid. Special leave refused to appeal from two concurrent judgments of the Courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing to the Judicial Committee of the Privy Council that there was no substantial question requiring to be determined, none of their Lordships having any doubt of the soundness of the judgments, though several judges of the first instance had held the Act to be invalid.—*Valin* v. *Langlois*.—P. C. . . . . i. 158

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——— Precedence in . . . . i. 488
See QUEEN'S COUNSEL.

PROVINCIAL LEGISLATURES—By the Statutes of the Quebec Legislature, 31 Vict. c. 32, and 32 Vict. c. 29, Fire Commissioners or Marshals were appointed, with power to investigate the origin of any fires occurring in the cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause: *Held*, that these Statutes were within the competency of the Provincial Legislature. On petition by the Attorney-General of the Province of Quebec, special leave was granted to appeal from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony.—*The Queen* v. *Coote*.—P. C. . . i. 57

——— 2. A Provincial Legislature of Canada has no power to pass an Act transferring to a new company, or otherwise, a federal railway, with its appurtenances, property, rights and powers, or to dissolve a federal company, or to substitute for it a company to be governed by, and subject to, Provincial legislation.—*Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal, Ottawa, et Occidental*.—P. C. . . . . i. 233

——— 3. The first step to be taken with a view to test the validity of an Act of a Provincial Legislature under the B.N.A. Act is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in section 92, which states the legislative powers of the Provincial Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does, these further questions may arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne.—*Dobie* v. *The Temporalities Board*.—P. C. . . . . i. 351

——— 4. A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of

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whom were living), the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith : *Held*, that such an Act was within the competence of the Provincial Legislature ; but the Court held further (Draper, C.J., and Spragge, C., dissenting) that the testator's grand-children, not having been expressly named in the Act, and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act. —*Re Goodhue.*—C. A., Ont. . i. 560

——— 5. Provincial Legislatures are not restricted to legislation respecting property such as bonds held in the Province, and where debts and other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of a Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.—*Jones* v. *Canada Central Railway Co.*—Q. B., Ont. . i. 777

——— 6. Provincial Legislatures have, as incident to their express powers under the B.N.A. Act, the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect of the administration of public affairs. The provisions of the Act of the Quebec Legislature, 35 Vict., c. 5, regulating this right are valid. Ramsay, J., dissenting.—*Ex parte Dansereau.*—Q. B., Quebec . . . . . ii. 165

——— 7. A Provincial Legislature has authority to determine the age or other qualifications which shall be required on the part of persons resident in the Province, to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under Provincial control. The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid. The Provincial Legislatures have the

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right to appropriate fines to municipal or other corporations. *Bennett* v. *Pharmaceutical Association of Quebec*—Q. B., Quebec. . . ii. 250

——— 8. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.—*Keefe* v. *McLennan.*—Supreme Ct., N. S. ii. 400

PUBLIC INJURY.—Proper officer to complain of.
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QUEEN'S COUNSEL.—*Appointment of.*] A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's Counsel, or to grant to any member of the Bar a patent of precedence in the Courts of the Province. (Henry, Taschereau and Gwynne, JJ.) The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the respondent being a Queen's Counsel appointed by the Governor-General ; and Strong, Fournier and Taschereau, JJ., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held, Per Strong and Fournier, JJ. :— That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the consti-

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tutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.—*Lenoir* v. *Ritchie.*—Supreme Ct., Can. . . . . i. 488

RAILWAYS.—Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the railway companies cannot by agreement waive this provision.—*Credit Valley Railway Co.* v. *Great Western Railway Co.**—Chy., Ont. . i. 822

——2. The Province of Ontario passed an Act to make provision for the safety of railway employees and the public, such provision having reference to the construction and maintenance of railway frogs, etc. Per Spragge, C. J., a Provincial Legislature has no power to pass such a law with reference to a Dominion railway situate locally within the Province. The other Judges of the Court of Appeal expressed no opinion upon the point, being of opinion that the Act was not intended to apply to Dominion railways, and for that reason did not apply to the Dominion railway company in question.—*Monkhouse* v. *Grand Trunk Railway.*—C. A., Ont. . . . . iii. 289

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SOVEREIGN.—*Representatives of.*] The members of the Executive Council of a Province, under the B. N. A. Act, represent the Sovereign, and cannot be sued in the civil courts of the Province for acts performed by them in the discharge of their official duty.—*Molson* v. *Chapleau.*—Superior Ct., Quebec . . . iii. 360

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TAXATION—An Act of the Provincial Legislature of New Brunswick (33 Vict. c. 47), intituled "An Act to authorize the issuing of debentures on the credit of the lower District of the Parish of St. Stephen, in the County of Charlotte," which empowered the majority of the inhabitants of that parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of the Legislature. A Provincial Legislature can, under the B. N. A. Act, sect. 92, art. 2, impose direct taxation for a local purpose upon a particular locality within the Province. The Act in question was held to relate to a matter of "a merely local or private nature in the Province," which, by the 92nd section of the B. N. A. Act is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in art. 10, subsect. (a) of the said section. *L'Union St. Jacques de Montreal* v. *Belisle*. L. R. 6 P. C. 31, approved.—*Dow* v. *Black*, P. C. . . . . i. 95

——— 2. The clauses of the Act, 39 Vict. c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts and renewals, are not authorized by the B. N. A. Act, 1867, s. 92, sub-ss. 2, 9. A License Act by which a licensee is compelled neither to take out, nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp Act and not a License Act. The imposition of a stamp duty on policies, renewals and receipts with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed is not warranted by the terms of an Act which authorizes the imposition of direct taxation. *Attorney-General for Quebec* v. *The Queen Insurance Co.*—P. C. . i. 117

——— 3. A Provincial Legislature cannot impose a tax upon the official income of an officer of the Dominion Government or confer such a power upon the municipalities.—*Leprohon* v. *City of Ottawa*.—C.A., Ont. . i. 592

——— 4. Held that Quebec Act (43 & 44 Vict. c. 9) which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein, is *ultra vires* of the Provincial Legislature. — *Attorney-General of Quebec* v. *Reed*—P. C. . . iii. 190

——— 5. The Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as portion of its cash reserve under the Dominion Act relating to "Banks and Banking" (34 Vict. c. 5, s. 14).—*Windsor* v. *Commercial Bank of Windsor*. . . . iii. 377

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——— Proceeds of insolvent estate ii. 343
See BANKRUPTCY AND INSOLVENCY, 5.

TEMPERANCE ACT OF 1864—The B. N. A. Act in assigning to the Parliament of Canada the exclusive legislative authority over "the regulation of Trade and Commerce," did not thereby repeal "The Temperance Act of 1864," of the late Province of Canada, 27-28 Vict. c. 18, and did not deprive municipal corporations of the power thereby given to prohibit the sale of intoxicating liquors.—*Nocl* v. *The Corporation of the County of Richmond*—Q. B., Quebec. . . . ii. 246

———2. A Provincial Legislature cannot repeal or modify those sections of the Temperance Act of 1864, (27, 28 Vict. c. 18), which conferred on Municipal Councils the power to pass by-laws for prohibiting the sale of intoxicating liquors.—*Hart* v. *Corporation of the County of Missisquoi*—Circuit Ct., Quebec . . ii. 382
Coocy v. *Municipality of Brome*—Circuit Ct., Quebec . . . ii. 385

———3. The Temperance Act of 1864, of the late Province of Canada, prohibited the sale of liquors by retail wherever the Act was brought into force, and provided special proceedings and punishments for offences against the Act; the Provincial Legislature of Ontario afterwards enacted

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that the sale of liquor in such localities should also be a contravention of the Provincial Acts for selling without a license: these Acts provided other punishments and proceedings: *Held*, that under the Temperance Act the matter was one of criminal law; and that the legislation of the Provincial Legislature was ultra vires.—*Regina* v. *Prittie*—Q. B., Ont. . . ii. 606
Regina v. *Lake*—Q. B., Ont. . ii. 616

——— 4. Acts of the Ontario Legislature, provided that local Boards of Commissioners, and Inspectors appointed by the Lieutenant-Governor, should perform certain duties in their respective localities for the enforcement of the statute of the late Province of Canada, called "The Temperance Act of 1864;" and that a certain proportion of the expenses attending the execution of these duties should be paid by the municipalities concerned. The Temperance Act provided for prosecution by private persons, as well as others, for offences against the Act: *Held*, that the Ontario enactments were within the competence of the Legislature. An enactment of an *ex post facto* character by a Provincial Legislature is not void on that ground.—*License Commissioners of Prince Edward* v. *County of Prince Edward*—Chy., Ont. . . . . ii. 678

——— 5. A Provincial Legislature cannot repeal those sections of the Temperance Act of 1864, which relate to the prohibition of the sale of intoxicating liquors.—*Griffith* v. *Rioux*—Superior Ct., Quebec . . iii. 348

TRADE AND COMMERCE.—The power of the Dominion Parliament for the regulation of trade and commerce includes political arrangements in regard to trade, and regulations of trade in matters of inter-provincial concern, and may, perhaps, include general regulations affecting the whole Dominion, but it does not comprehend the power to regulate the contracts of a particular business or trade (such as the business of fire insurance) in a single Province. An Act of the Province of Ontario to secure uniform conditions in policies of fire insurance was held to be within the power of a Provincial Legislature over "property and civil rights." Such an Act, so far as relates to insurance on property within the Province, may bind all fire insurance

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companies, whether incorporated by Dominion, Provincial, Colonial or Foreign authority. A Dominion Act having required insurance companies to obtain licenses from the Minister of Finance as a condition of their carrying on the business of insurance in the Dominion, neither the Act, nor the fact of a Company having obtained such license, was held to withdraw the Company from the operation of the Provincial Act.—*Citizens and Queen Insurance Companies* v. *Parsons*—P.C. . . . . i. 265

——— 2. An Act which authorized the Corporation of the City of Montreal to impose a license tax on butchers keeping stalls or shops in the city for the sale of meat, fish, etc., elsewhere than on the public markets, was held not to be *ultra vires* of the Provincial Legislature, as an interference with trade and commerce.—*Angers* v. *The City of Montreal*—Superior Ct., Quebec . . . . . ii. 335
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